

JURISPRUDENCE

By
ROSCOE POUND

Volume IV

Part 6. Application and Enforcement of Law

Part 7. Analysis of General Juristic Conceptions

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Pound Jurisprudence

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Part 6

**APPLICATION AND
ENFORCEMENT OF LAW**

20. The Judicial Process in Action, §§ 115–116.

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Chapter 20

The Judicial Process in Action

§ 115. Application of Legal Precepts.

§ 116. Individualization of Application.

*

Chapter 20

The Judicial Process in Action¹

Section 115

APPLICATION OF LEGAL PRECEPTS. 1.

Analysis of the judicial process, as has been set forth in another connection,² distinguishes as the functions which are involved in the decision of a case according to law: (1) Finding the facts,

1. Pound, *Theory of Judicial Decision* (1923) 36 *Harvard Law Rev.* 641, 802, 940; *id.* *The Enforcement of Law* (1908) 20 *Green Bag*, 401; *id.* *Courts and Legislation* (1912) 7 *Am.Pol.Sci.Rev.* 361, (1917) 9 *Modern Legal Philosophy Series*, *Science of Legal Method*, 202; 9 *Modern Legal Philosophy Series*, *Science of Legal Method* (1917) chaps. 1-5; Wigmore, *Problems of Law* (1920) 65-101; Pollock, *Judicial Caution and Valour* (1925) 45 *L.Q.Rev.* 293, 300-304; Arnold, *Substantive Law and Procedure* (1932) 45 *Harvard Law Rev.* 617; *id.* *Law Enforcement—An Attempt at Social Dissection* (1932) 42 *Yale Law Journ.* 1; Willoughby, *Principles of Judicial Administration* (1929) 91-206; Isaacs, *The Limits of Judicial Discretion* (1923) 32 *Yale Law. Journ.* 339.

Gény, *Méthode d'interprétation* (2 ed. 1919) is largely devoted to application of law. See also 1 Gény, *Science et technique en droit privé positif* (1913) and vol. 2 (1915); Saleilles, *Preface to Gény, Méthode d'interprétation* (1 ed. 1899); Kantorowicz, *Legal Science* (1928) 28 *Columbia Law Rev.* 679, 692, 707; Van der Eycken, *Méthode positive de l'interprétation juridique* (1907); Mailleux, *L'exégèse des codes* (1908); Ransson, *Essai sur l'art de juger* (2 ed. 1912).

Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft* (1903); Gnaeus Flavius (Kantorowicz) *Der Kampf um die Rechtswissenschaft* (1906); Fuchs, *Recht und Wahrheit in unserer heutigen Justiz* (1908); *id.* *Die gemeinschädlichkeit der konstruktiven Jurisprudenz* (1909); Oertmann, *Gesetzeszwang und Richterfreiheit* (1909); Rumpf, *Gesetz und Richter* (1906); Brütt, *Die Kunst der Rechtsanwendung* (1907); Gmelin, *Quousque? Beiträge zur soziologischen*

2. See note 2 on page 6.

Application And Enforcement of Law

i.e. ascertaining the state of facts to which legal precepts are to be applied in order to reach a determination; (2) finding the law, i.e. ascertaining the legal precept or precepts applicable to the facts found; (3) interpreting the precept or precepts to be applied, i.e. ascertaining their meaning by genuine interpretation,³ and (4) applying the precept or precepts so found and interpreted to the case in hand.

Finding the law often requires finding by applying the authoritative technique to the authoritative guides to decision in order to develop a precept by analogy. Hence it runs into a lawmaking function and may involve "a judgment as to the relative worth and importance of competing legislative grounds."⁴ Even where choice of starting points is determined by a received ideal which

Rechtfindung (1910); Kantorowicz, Rechtswissenschaft und Soziologie (1911) 11 ff.; Reichel, Gesetz und Richterspruch (1915); Jellinek, Gesetz, Gesetzesanwendung, und Zweckmassigkeitserwägung (1913); Somló, Juristische Grundlehre (1917) §§ 110–122; Stammer, Rechts und Staatstheorien der Neuzeit (1917) § 18; Kantorowicz, Aus der Vorgeschichte der Freirechtslehre (1925); Holldack, Grenzen der Erkenntnis ausländischen Rechts (1919); Stampe, Grundriss der Wertbewegungslehre: Zur Einleitung in ein freirechtliches System der Schuldverhältnisse (2 vols. 1912, 1919); Schultz, Die Persönlichkeit des Richters (1930) 24 Leipziger Zeitschrift für deutsches Recht, 1; Alexeff, L'état, le droit, et le pouvoir discretional des autorités publiques (1929) 3 Revue internationale de la théorie du droit, 195; Schultze, Von den Grenzen der Rechtsprechung (1930) 35 Deutsche Juristen-Zeitung (1930) 127; Kübl, Das Rechtsgefühl (1913); Riezler, Das Rechtsgefühl (1921) 123–158.

2. *Ante*, § 106, 2.

3. 2 Austin, Jurisprudence (5 ed. 1885) 989–991. See *ante*, § 106, 2.

4. Holmes, The Path of the Law (1897) 10 Harvard Law Rev. 457, 466, reprinted in Holmes, Collected Papers (1921) 167, 181.

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is itself part of the law, the process of apprehending and using it may be in substance legislative in character. Likewise interpretation on one side runs into lawmaking, and so the judicial function runs into the legislative function at this point also. On the other side, interpretation runs into application and so the judicial function runs into the administrative.

A persistent idea that there is properly no administrative element in the decision of causes, and that application of law is or should be a purely mechanical process, goes back to Aristotle's *Politics*.⁵ Aristotle conceived that discretion was an administrative attribute;⁶ that in administration regard was to be had to times and men and special circumstances, and the magistrates were to use a wise discretion in adjusting the machinery of government to actual situations as they arose. On the other hand, he thought that in judging according to law there was no discretion.⁷ The judicial office was a Procrustean one of fitting each case to the legal bed, if necessary, by a surgical operation.⁸ This fitted well into the Byzantine theory of lawmaking and of judicial application which French publicists adopted in the sixteenth century and gave currency to in the seventeenth and eighteenth cen-

5. ii, 8, 13, iii, 15, 4-6, iii, 16, 4-7.

6. *Ibid.* See also *Nicomachean Ethics*, v, 4, 3-4, v, 10, 6-7.

7. *Politics*, iii, 16, 4-7.

8. As to this it must be remembered that he is thinking of laws, not of law in the second sense as more than an aggregate of rules in the strict sense.

turies. This idea has broken down in practice no less than the idea of complete separation of the judicial from the lawmaking process.

It was a favorite political idea of the eighteenth and nineteenth century that a rule in the narrower sense could be provided for every case either expressly or by prescribing set premises from which further rules were necessary deductions to be reached by pure and absolute logical processes. As is the case with almost all widely held theories there was a sound kernel here. In the fields of the legal order appropriate to rules in the narrower sense rules and authoritative starting points from which to reach further rules are both practicable and desirable. But even here it is often necessary to choose from among starting points of equal authority and the choice is beyond the reach of mechanical logic. Moreover, there are fields of the legal order to which rules in the narrower sense are not or are less appropriate. Here the theory of mechanical-logical application of exactly prescribed rules or rules logically drawn from exactly prescribed premises fails. But there were three special reasons for its currency in America. One reason is to be found in fear of arbitrary judicial action growing out of English political history. Desire to preclude possibility of arbitrary judicial action was especially strong in the United States because in seventeenth-century England (the time of colonizing America) the criminal law, in the hands of appointees of the crown subject to arbitrary removal,

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had been found an effective agent of political and religious persecution. Our law as to misdemeanors had developed in the Court of Star Chamber, an administrative tribunal, and the contests between the courts and the crown in the seventeenth century had convinced the next age that there was no safety other than in hard and fast legal formulas applied mechanically. Another reason is to be found in the Puritan doctrine of consociation rather than subordination, that we are "not over one another but with one another" which I have spoken of elsewhere.⁹ Another reason grew out of colonial experience. Colonial justice was long executive or legislative. There had been but little experience of true judicial justice with the checks upon judicial action which the common law tradition and pressure of professional opinion provide.

After the French Revolution reaction from political absolutism reinforced ideas of the judicial function inherited from the Roman law of the later empire and brought about a general acceptance of the mechanical logical theory for a time everywhere. In other words, political history and the Puritanism of our formative era merely tightened the hold upon us of a theory which for a time was accepted throughout Europe. To find a proper mean between a system of rules applied mechanically and a system of completely individualized justice is one of the inherent difficulties of all administration of jus-

9. Pound, *The Spirit of the Common Law* (1921) chap. 2.

tice. In the movement back and forth from the over-arbitrary to the over-mechanical, the nineteenth century tended to stand for the latter.¹⁰

2. *The technical and the discretionary in the process of application.* I have spoken elsewhere of two antagonistic ideas which we find everywhere in the administration of justice, namely, the technical and the discretionary.¹¹ In another way of putting it, there is a contrast between application of law in the second sense, that is, application by an authoritative technique of a body of authoritative guides to decision and determination of controversies by regarding them as unique and applying the sense of justice and the experience of the tribunal to

10. This is well brought out in a much quoted passage from a well known text writer. "General restrictions in these matters, if universally adhered to with literal strictness, will necessarily involve some apparent absurdities, when applied to the circumstances of certain particular cases. But to leave it in the breast of the judge to relax or supersede general restrictions and rules, whenever he shall think particular cases not within the reason of them, may perhaps, by some, be thought a more important absurdity, and a matter of greater mischief in its tendency and consequences, than that which is intended to be obviated by it; for this is in fact making the discretion of the judge the only law in such cases. An error, which our forefathers seem to have been even illiberally studious to keep clear of. For their creed seems to have been, what I have read expressed, in so much energy of terms, by a great judge even of these times. 'The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable.'" Fearne, *Essay on the Learning of Contingent Remainders and Executory Devises* (1791) 428, note A, quoting Pratt, C. J. (afterwards Lord Camden) in *Doe v. Kersey* (Common Pleas, 1765).

11. *Ante*, § 75. See Pound, *Justice According to Law* (1913) 13 *Columbia Law Rev.* 676.

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the particular situation of fact. Typically, it is a contrast between the judicial and the administrative. But, as has been said above, the two, while typically distinct, shade into one another. Standards are part of the body of authoritative guides to decision. Yet judicial application of them involves the administrative method. Administrative agencies have a function of guidance directed by discretion. Yet the exercise of discretion may involve determinations required to be governed by rules provided by legislation. Thus there is an administrative element in judicial application of law in the second sense and a judicial element in administrative application. In the strict law and in the maturity of law the tendency is to repress and endeavor to exclude the administrative element in application. In the strict law this is sought by hard and fast mechanical procedure. In the maturity of law it is sought by attempt to reduce the whole of law in the second sense to rules in the narrower sense to be applied logically. An example may be seen in the nineteenth-century mode of treating all questions of exercise of the powers of a court of equity as jurisdictional making rules of granting or denying relief instead of referring them to principles by which discretion could be guided.¹²

12. I have discussed this at some length in *Cleveland Bar Association, Recent Developments in the Law of Equity of Interest to the Practising Lawyer* (1933).

Application And Enforcement of Law

In the strict law the tendency was to some extent corrected and the balance with the administrative element was in some measure achieved at first by fictions and later by an executive dispensing power. The authority of the praetor at Rome derived from a part of the royal authority to which the magistrates succeeded on the expulsion of the kings. In the Germanic law when the king administered justice he was not bound by the formality of the law as the ordinary tribunals were. This royal dispensing power turns into interposition of praetor or chancellor on equitable grounds. The origin of English equity is to be found in a royal power of discretionary application in particular cases, a phase of the royal dispensing power which was one of the causes of the downfall of the Stuarts. Carried too far in the stage of equity and natural law, this over-development of the administrative element in application brings about a reaction and in the maturity of law the administrative element is again pushed to the wall.¹³ Today in the United States we have been attempting to restore the balance by reverting to justice without law (i.e. law in the second sense) through wide and unchecked or little checked powers of adjudication by administrative agencies. In continental Europe there has been some movement in this di-

13. *Ante*, § 33. See also Selden, *Table Talk*, tit. Equity, Selden Society ed. (1927); St. German, *Doctor and Student*, Dial. 1, chaps. 16-17 (published 1523, convenient ed. by Muchall, 1815, reprinted in U. S. 1874 and 1886); 1 Spence, *History of the Equitable Jurisdiction of the Court of Chancery* (1846) pt. 2, bk. 2, chap. 1.

rection. In penal legislation, the general tendency is to seek to work out some system of judicial individualization—judicial fitting of the rule and the application to the case, along the lines which had already developed in the systematized English equity.

In the nineteenth century men believed in administration of justice mechanically by abstract formulas. A reaction from this has been going on throughout the world and no doubt marks a new period of growth or a new stage of legal development. In criminalistic it takes the form of a movement for the individualization of penal treatment.¹⁴ In France it appeared at the end of the nineteenth century as a movement for a newer and freer method of interpreting the codes.¹⁵ But the “interpretation” referred to is partly law-finding by developing code provisions by analogy and partly the application side of the judicial function. In Germany, it took the form of agitation for “equitable interpretation” which will be considered below. Here again “interpretation” means partly law-finding as above and partly application. In England, it is manifest in Lord Esher’s farewell speech in which he thanked God that English law was not a science,¹⁶ in Sir John Hollams’s protest against treating

14. See e. g. Saleilles, *L’individualisation de la peine* (1902) transl. by Mrs. Jastrow as *The Individualisation of Punishment* (1911).

15. The classical book is Gény *Méthode d’interprétation en droit privé positif* (1899, 2 ed. 1919).

16. Manson, *Builders of Our Law During the Reign of Queen Victoria* (2 ed. 1904) 398.

the private controversy between John Doe and Richard Roe not as a cause in which justice is to be done primarily but primarily as a means by which to settle the law for other litigants,¹⁷ and in the wider discretion which is now accorded to the bench in order to give fuller power of attaining just results in individual cases. In the United States it has been manifest in a tendency to seek extra-legal attainment of just results while preserving the form of the law. The Germans have worked out a theory of this in their controversy over so-called equitable application of legal precepts.

3. *Law in books and the judicial and administrative processes in action.*¹⁸ That the judicial and administrative processes in action do not always conform to law in the second sense as laid down in the law books in the results reached, and sometimes do not even attempt to conform or create an appearance of conformity, has been much insisted upon in the present century. Such departures from the ideal of a uniform administration of

17. Hollams, *Jottings of an Old Solicitor* (1906) 161.

18. Pound, *Law in Books and Law in Action* (1910) 44 *Am. Law Rev.* 12, reprinted from 14 *Rep. Md. State Bar Ass'n* (1909) 298; Wiel, *Public Policy in Western Water Decisions* (1912) 1 *Calif. Law Rev.* 11; 2 Hervey, *Some Records of Crime* (1892) 6-7, note 1; Pound, *Inherent and Acquired Difficulties in the Administration of Punitive Justice* (1907) *Proc. Am. Pol. Sci. Ass'n* 223, 234-238; Stammer, *Systematische Theorie der Rechtswissenschaft* (2 ed. 1923) 130-134.

Llewellyn, *Some Realism About Realism* (1931) 44 *Harvard Law Rev.* 1222, 1248-1250; Clark, *Reform in Bankruptcy Administration* (1930) 43 *Harvard Law Rev.* 1189, 1192-1201; Green, *Judge and Jury* (1930) chap. 14; Frank, *Law and the Modern Mind* (1930) chap. 16.

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justice according to law are more noticeable at some times than at others. Also they are more marked in some fields of the law than in others. The reason for them may be found sometimes in lack of social psychological guarantee behind particular legal precepts.¹⁹ This chiefly affects application of legal precepts so that they fail to bring about the results for which they were devised. Another reason is to be found in the pressure of newly asserted interests which, if recognized, may require new delimitation of those which had been recognized and delimited in the past. Here the effect is chiefly upon the law-finding process. Still another is changing ideals of the end of law. This affects choice of starting points for reasoning, and interpretation, but also the application of standards. It is more marked in application of standards because of the margin for circumstances of time, place, and individual case which is involved. Hence it is misleading to take application of standards as the type of application of law in the second sense. Much of neo-realist jurisprudence builds on this taking of standards as the type of legal precept—something quite as mistaken as the nineteenth-century taking of the rule in the narrower sense (e.g. a rule of property) as the type.

There is nothing new in this departure of the judicial process in action from the law in the books. It has always happened in particular cases sporadically, and

19. *Ante*, §§ 25, 101, 2.

from time to time in legal history has happened on a somewhat large scale for classes of cases. But as we look back we see that it has not, so far as legal systems which have reached maturity are concerned, permanently impaired the stability of the legal order or the certainty and uniformity in the judicial process which is attained through law in the second sense.

Take, for example, what have been called "Mansfield's innovations." They were a phenomenon in the era of growth under the influence of the ideas of natural law. Serjeant Hill, "a very deep black-letter lawyer,"²⁰ is said to have threatened to burn his law books, saying that law books were of no use in the King's Bench under Mansfield. But Lord Mansfield's decisions have been adhered to and with scarce an exception have stood as law for almost two hundred years. They did not destroy law. They made law. Moreover, "Mansfield's innovations" were typically in finding law, not in applying law, unless in the case of the indenture in which the counterpart was cut straight across instead of the waving or indented line called for in the old books.²¹ Even here the established conveyance was merely adapted to modern conditions without changing its nature or effect or making any essential modification of its nature.

20. 2 Lord Campbell, *Lives of the Chief Justices* (1849) 571-572.

21. *Ibid.* 571.

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Jhering pointed out the administrative element in adjudication, thinking, however, of law-finding.²² Stammler emphasized the administrative element in application of law, in attaining just results through legal precepts.²³ It is true that we can't separate law-finding and application of law in the sense that the results of application, measured by received ideals, will determine the starting point for law-finding as between starting points of equal authority. But this affects law-finding rather than application of law.

Departures of the administrative process in action from the law in the books which should govern it have been considered in another connection.²⁴ They occur chiefly in law-finding and in interpreting legal precepts. Application of standards by administrative agencies involves a wide margin for adaptation to circumstances, and is less affected by the lack of checks upon administrative determinations and excessive zeal to promote particular ends which often lead to administrative disregard of legal precepts.

4. *The modes of applying legal precepts.*²⁵ A period of enacted law brought on a controversy among Ger-

22. *Ante*, § 14.

23. *Ante*, § 15. But his subsuming of questions of law under the social ideal and its principles has to do both with finding of law and with application. It is specially fitted to application.

24. *Ante*, § 78.

25. Cardozo, *The Nature of the Judicial Process* (1921).

man jurists at the beginning of the present century which is instructive for us. Three schools could be distinguished in Germany after the code, differentiated according to the manner in which they applied code provisions, and the point of view from which they approached the code. First, there was what we may call the literal school.²⁶ The adherents of this school asked: What do the several code provisions mean as they stand, applying the canons of genuine interpretation? They endeavored to find the proper code pigeonhole for each concrete cause, to put the cause in hand into it by a logical process, and to formulate the result in a judgment. Their standpoint was essentially analytical.

Secondly, there was a historical school. With the adherents of this school the code provisions were assumed to be in the main declaratory of the law as it previously existed. The code was regarded as a continuation and development of pre-existing law. With them all exposition of the code and of any of its provisions must begin by an elaborate inquiry into the pre-existing law and the history and development of the competing juristic theories among which the framers of the code had to choose. This, however, has to do with law-finding and interpretation. Their method of application of the law was substantially the same as that of the literal school. While

26. E. g. Planck, *Bürgerliches Gesetzbuch* (1 ed. 2 vols. 1897-1900, 7 vols. 1913-1933).

they saw in a code provision not the command of the sovereign, to be regarded in and of itself in applying it, but a development out of the juristic theory of the past, they agreed that when its content was ascertained and was interpreted the process of application was a purely logical one—do the facts come within or fail to come within the rule? Such, according to this school also was the sole question for a court. Ethical questions were for the legislator. When the court had by historical investigation found out what the rule was, it had simply to fit the rule to just and unjust alike.²⁷ In other words, both the literal and the historical school took the end-of-the-eighteenth-century position and wholly excluded the administrative element in application. Needless to say this to some extent broke down in practice. But the breakdown was more or less covered up by a fiction of interpretation.

A third school, which I have ventured to call the equitable school, sprang up and grew strong in Germany in the first decade of the present century.²⁸ To this school the essential thing was a reasonable and just solution of the individual controversy. It conceived of the legislative

27. See the protest against this method in Cosack, *Lehrbuch des deutschen bürgerlichen Rechts* (1 ed. 1899) 41, and Leonhard's comment, *Der allgemeine Theil des bürgerlichen Gesetzbuchs* (1900) 43–50.

28. See reference in the third paragraph of note 1, *supra*. Also discussions in 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9 ed. 1903) §§ 12, 13; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1905) §§ 38–40; Heck, *Gesetzesauslegung und Interessenjurisprudenz* (1914) § 19—a critique of Kohler. See also 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 199–225.

rule as a general guide to the judge, leading him toward the just result. But it insisted that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the reason and moral sense of ordinary men. It insisted that application of law was not a purely mechanical process. It contended that the process involved not merely logic but intuition; that the cause was not to be fitted to the rule, but the rule to the cause. In other words, it recognized the administrative element as a legitimate part of the judicial function and insisted that individualization in the application of legal precepts was no less important than the precepts themselves. This is really a theory of the application of standards extended to all application as the others are theories of the application of rules in the narrower sense extended to all application.

§ 116. INDIVIDUALIZATION OF APPLICATION. Individualization in application is a problem in all systems of law which have reached maturity. In all such systems jurists are confronted by a need of balance between the general security and security of the economic order, on the one hand, calling for certainty, uniformity, and predictability, and the individual life, on the other hand, calling for individualized application. Let us look at that problem as it appears in Anglo-American law of today and as we find it in the civil or modern Roman law and under the modern codes.

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1. *Individualization of application in Anglo-American law.* The need of individualization was felt in the common law in the stage of the strict law when resort was had to the dispensing powers of the king, which came to be exercised by the chancellor and led in time to the rise of the Court of Chancery and development of equity. To-day we may recognize six modes of individualizing application of law in our system: (a) Individualization in equity; (b) individualization by the jury; (c) individualizing by the court through latitude of application under guise of choice or ascertainment of a rule; (d) individualization through legal standards; (e) individualization through a series of mitigating devices in criminal procedure; (f) individualization through wide discretion of magistrates in petty causes. Some of these have been systematized, while some others remain crude.

(a) In equity. In the common law we have achieved a system of individualization in equity through discretion in the exercise of jurisdiction and adaptation of remedies. Anglo-American equity steers a middle course between two extremes. The eighteenth and nineteenth centuries sought to individualize the law by minute rules in the narrower sense, so as to have a rule for every possible case. At the other extreme is the idea for which Ofner²⁹ and Fuchs³⁰ contend, namely, that a rule of law

29. Studien sozialer Jurisprudenz (1894) 1-29.

30. Recht und Wahrheit in unserer heutigen Justiz (1908); Die gemeinschädlichkeit der konstruktiven Jurisprudenz (1909); Juristischer Kulturkampf (1912).

is a mere general guide by the help of which, to the extent it helps him, the court does what it takes to be justice in the case in hand. As Dr. Kirchwey once put it, referring to realist views as to the force of precedents in our Anglo-American technique of decision, a rule was to be "only a flickering light" to guide the tribunal.³¹ Each extreme over-simplifies a difficult problem.

Especially in those fields which call for rules in the narrower sense rather than standards, "justice in the case in hand," or "the sense of right and justice of the ordinary man," or "the social standard of justice" are likely to be too subjective, in a time when there are not universally recognized authorities in these matters, to be compatible with the general security. It impairs the balance between the general security and the individual life. When a rule of property or a rule of commercial law or the liberty of the individual is involved, a rule of law must be more than a "flickering light" to guide toward the result. On the one hand, we must recognize an administrative element in the judicial function. To this extent the German reformers were on solid ground. On the other hand, we must recognize the place of rule and conception as giving us certainty and uniformity and thus giving effect to the social interest in the general security. To this extent the nineteenth century was on

31. Remarks before the Conference on Legal and Social Philosophy (1913). Dr. Kirchwey's address was not printed. I write from notes taken at the time.

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solid ground. Instead of the nineteenth-century solution—to individualize the law (second sense) by excessive detail—or the solution of the German radicals—to individualize the application of law by taking away from rules all character but that of general guides—equity in the common-law system found the solution in individualizing the remedy in accordance with principles and in adopting a theory of finding the law that will give rational form and intelligent direction to what is actually done. In Anglo-American equity we choose such a remedy and apply the remedy chosen in such a way as best to give effect to the rule as a precept of justice in the case in hand.

For example, in a bill in the nature of a bill of peace we may enjoin all the parties and try the case as to all in equity, or we may enjoin all but one and allow that one to proceed at law, holding the others to the result, or, where the relief sought is against the public or a large and indefinite portion of the public, bring in a sufficient number to be fairly representative. There is the same substantive rule whichever course is taken. But the remedy to give effect to it is chosen in view of and is adapted to the case in hand.³² Or take the situation in which a court of equity enjoins breach of a contract of employment and assures counter-performance by a conditional decree adapted to the case,³³ or interpleader against a resident and a non-resident claimant, where the court may make the resident claimant indemnify the

32. *Lockwood Co. v. Lawrence*, 77 Me. 297, 306 (1885); *Smith v. Smith*, 148 Mass. 1, 6, 18 N.E. 595, 597, (1888); *Foxwell v. Webster*, 2 Drew. & Sm. 250 (1863); *Sheffield Water Works v. Yeomans*, L.R. 2 Ch.App. 8 (1866).

33. *E. g. Philadelphia Base Ball Club v. Lajoie*, 202 Pa. 210, 221, 51 A. 973, 975, 58 L.R.A. 227 (1902).

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complainant on proving his claim, if the non-resident claimant will not come in on notice.³⁴ Again in cases of fraud relief may be granted by way of cancellation or of constructive trust or of equitable lien according to what will best achieve justice in the particular case.³⁵ In cases of pursuit of a trust fund where mingling has taken place, the court may impose a constructive trust *pro tanto* or an equitable lien according to what will best effectuate the substantive law and reach an equitable result in the case in hand.³⁶ Likewise, where there has been unjust enrichment at another's expense remedy may be found in subrogation, equitable lien or constructive trust, as the circumstances of the case may make expedient.³⁷ Also where there is a contract right, the remedy may be reformation, specific performance, or constructive trust in order to give effect to the right to get a parcel of land *in specie* where there has been an error in the conveyance.

What is significant, equity does not permit any discretion as to the substantive rights. But it regards the end of the rule and seeks the most effective means of attaining it while reaching a just result in view of the case in hand.

We cannot allow discretion as to recognizing, delimiting, or securing of interests. But how best to se-

34. *Stevenson v. Anderson*, 2 Vesey & Beames, 407 (1814).

35. 3 Scott, Trusts (1939) § 508; *In re Hallett's Estate*, 13 Ch.D. 696, 709 (1879). For a case where the court refused to impose a constructive trust and instead imposed an equitable lien, see *Hart v. Dogge*, 27 Neb. 256, 42 N.W. 1035 (1889). Cf. *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N.W. 905, 57 L.R.A. 885 (1902).

36. Scott, Trusts, *supra*; *In re Hallett's Estate*, *supra*.

37. See e. g. *Kinhead v. Ryan*, 64 N.J.Eq. 454, 461-462, 53 A. 1053, 1056 (1903).

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cure them, in view of conflicting or overlapping interests, under the circumstances of the case in hand, is a question of administration. It is a question of considering the parties and the circumstances and giving effect to the ends of the precepts of substantive law in view thereof. Equitablizing of our application of law is one of the problems of the future.

(b) Through the jury.³⁸ The chief reliance of the common law for individualizing the application of law has been the power of juries to render general verdicts; the power to find the facts in such a way as to compel a different result from that which the legal rule strictly applied would require. Probably this power alone made the common law of master and servant tolerable in American jurisdictions fifty years ago. Yet exercise of it, with respect to which, as Coke expressed it, the jurors are chancellors,³⁹ has made the jury a most unsatisfactory tribunal in many classes of cases and, in view of the practice of repeated new trials, which this power has in large part occasioned, a most expensive one. It is a crude mode of individualization.

(c) Through latitude of application under the guise of choice or ascertainment of a rule.⁴⁰ In some

38. Morris, *Punitive Damages in Tort Cases* (1931) 44 *Harvard Law Rev.* 1171, 1188-1192; Green, *Judge and Jury* (1930) chap. 5, especially pp. 177 ff.; Washington, *Damages in Contract at Common Law* (1932) 48 *Law Quart. Rev.* 90, 107-108.

39. *Hixt v. Goats*, 1 Rolle, 257 (1615).

40. Hutcheson, *Lawyer's Law and the Little Small Dice* (1932) 7 *Tulane Law Rev.* 1; *id.* *Judging as Administration* (1932) 7 *Am. Law School Rev.*

types of case to an apparently growing extent the practice of our application of law has been coming to be that courts take the rules of law as a general guide, determine what they conceive the equities of the case demand, and contrive to render a judgment accordingly, wrenching the law no more than necessary. Many courts today are suspected of ascertaining what the supposed equities of a controversy require and then citing adjudicated cases to justify the result desired. Occasionally we find a judge avowing frankly that he looks chiefly at the ethical situation *inter partes* and does not allow the law to interfere therewith beyond what is inevitable.⁴¹ This is essentially what the German equitable school contended for. It is something of which complaint may be heard in America whenever a knot of lawyers is met with discussing recent decisions of the courts.

As to the jury, there has been a steady growth of means of minimizing their power of dispensing with the law. Giving up of the "scintilla" doctrine, direction of verdicts, and putting special questions to the jury instead of leaving the whole case to a general verdict, have tempered jury lawlessness. As to the courts there is, especially in applying standards, at times a crude equitable application—a crude individualization. This power is assumed by courts in America more widely at times than appears on the surface or, at least, more widely than we

1069; *id.* The Judgment Intuitive—The Function of the "Hunch" in Judicial Decisions (1919) 14 Cornell Law Quart. 274.

41. Carter, The Supreme Court and its Method of Work (1906) 1 Ill. Law Rev. 151, 155.

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like to acknowledge. But there is this characteristic difference. In Germany a generation ago it was admitted. A scientific theory was worked out to explain and justify it, and an open controversy raged as to its propriety. That is, the German jurists sought to have individualizing done intelligently and systematically. With us the process is largely concealed. Ostensibly there is no such power of equitable application. The process reveals itself under the name of "implication," or in the guise of two lines of decisions of the same tribunal upon the same point from which it may choose at will,⁴² or in the form of what might be called soft spots in the law—spots where the lines are so drawn by the adjudicated cases that the court may go either way, as the exigencies of equitable application may require, with no apparent transgression of what purport to be settled rules. Sometimes this sort of application gets over into questions of property where individualized application is out of place as, for example, in assuming permissive user or adverse user where there is a claim of acquisition of an easement by prescription. Thus we have not a little of equitable application in America, while disclaiming it in theory, and that, too, in a way which is unhappily destructive of certainty and uniformity in fields of the administration of justice where those qualities are required. Not only do lawyers and law writers perceive this situation, but is it perceived also, in an age of publicity, by the public. Necessary as it is, to some extent and in some fields of the administration of justice, especially in a time in which received ideals are being rejected and ideas of the end of law are in transition, the method in which it is often carried out in this country is rightly felt to be illegal. It injures respect for law and for the courts. There is no one cause of the current attitude toward law. But judicial evasion and warping of the

42. A striking instance is discussed in *Faulkner v. Simms* (1903) 68 Neb. 295, 299, 300-306, 94 N.W. 113-116.

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law, in the endeavor to secure in practice a freedom of judicial action not conceded in theory, is certainly one cause.

(d) Through legal standards.⁴³ In the common-law system in private law individualized application is achieved both at law ⁴⁴ and in equity ⁴⁵ by precepts establishing standards.⁴⁶ The standards are to be applied with reference to the circumstances of each case.⁴⁷ But application of them is by no means wholly at large.⁴⁸ Also today application of standards is largely committed to administrative agencies.⁴⁹

(e) In criminal law.⁵⁰ Our criminal law has a long series of mitigating devices for introducing discretion into its application. The police exercise a certain discretion as to who shall be brought before the courts. The public prosecutor has wide and substantially uncontrolled power of ignoring offenses or offenders, of dis-

43. As to standards in other systems see German Civil Code, §§ 242, 826; Swoboda, *Das Privatrecht der Zukunft* (1932) 25 *Archiv für Rechts- und Wirtschaftsphilosophie*, 459, 466-468.

44. Note (1933) 46 *Harvard Law Rev.* 838-842; Note (1934) 47 *Harvard Law Rev.* 494-502; Interstate Commerce Act, § 3, 49 U.S.C. § 3(1).

45. Romilly, M.R. in *Haywood v. Cope*, 25 *Beav.* 140, 150-153 (1838); *English Common Law Procedure Act* (1854) § 81.

46. *Ante*, § 58.

47. *Ibid.*

48. See the excellent statement by Langton, J. in *Greenwood v. Greenwood*, [1937] P. 157, 164.

49. See as to standards in administrative law Landis, *The Administrative Process* (1938) 66-68.

50. Pound, *Criminal Justice in America* (1930) 41-43.

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missing proceedings in their earlier stages, of so presenting them to grand juries that no indictment follows, of declining to prosecute after indictment, and of agreeing to accept a plea of guilty of a lesser offense.⁵¹ The grand jury may ignore a charge and refuse to find an indictment. The trial jury notoriously exercises a dispensing power through its general verdict of not guilty, which is not reviewable.⁵² Exercised in homicide cases during the vogue of the "unwritten law" it led to the situation Mark Twain satirized when he called upon the legislature to make insanity a crime. The court has at common law a wide discretion as to sentence,⁵³ and often as to suspension or mitigation of sentence; to which in recent years we have added probation.⁵⁴

51. Bettman, Criminal Justice Surveys Analysis, in National Commission on Law Observance and Enforcement, Report on Prosecution (1931) 39, 95-100; National Commission on Law Observance and Enforcement, Report of the Commission (1931) 3, 95-100; Illinois Crime Survey (1929) 42-45, 269-274, 301-307; American Law Institute, Model Code of Criminal Procedure (1930) § 305 and Commentary.

52. As to this see Train, From the District Attorney's Office (1939) chap. 6.

53. 2 Harris (editor) Reminiscences of Sir Henry Hawkins (1904) 282-290; Train, From the District Attorney's Office (1939) 167-177. On sentence generally see Exner, Studien ueber die Strafzumessungspraxis der deutschen Gerichte, Kriminalistische Abhandlungen, no. 16 (1931); Heinitz, Der Strafzweck bei der richterlichen Strafbemessung (1929) 22 Archiv für Rechts- und Wirtschaftsphilosophie 259; 3 Mendizabal, Tratado de derecho natural (7 ed. 1931) 448-461.

54. Glueck (editor) Probation and Criminal Justice (1933); National Commission on Law Observance and Enforcement, Report on Penal Institutions, Probation and Parole (1931) 184-207; Cooley, Probation and Delinquency (1927) chap. 2; Young, Social Treatment in Probation and Delinquency (2 ed. 1952) 161-268.

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Dissatisfaction with exercise of discretion in judicial sentence and inability to procure convictions in cases of homicide because of fixed sentences which juries regarded as over severe has led many jurisdictions by statute to leave assessment of punishment to the trial jury.⁵⁵

In the penal code of California there is provision for the fixing of penalties by the jury, and a collection of criminal cases by a captain of police of San Francisco ⁵⁶ enables us to see how the power has been exercised. As one studies the cases he can see to a certain degree that broad lines were drawn by the juries, even if crudely. But one of these lines which is most apparent is between picturesque murder, however brutal, and brutal murder without the picturesque element. Then, too, the cases show that the choice of penalty depends very largely on the temper of particular juries. For example, Goldenson, a boy of nineteen who suddenly killed a girl of thirteen was hanged, while Hoff, a mature man, who brutally murdered a woman who had employed him, having been sentenced to be hanged on the first trial, on a second trial, granted for an error of procedure, was sentenced to imprisonment for life. In the case of murder for gain or incident to robbery this is even more apparent. The so-called "gas-pipe murderers," who were robbers, were hanged. So was Kovalev, an escaped Siberian convict, who murdered for gain. But Sontag and Evans, professional bandits, who had committed a long series of train robberies, had killed many and shot many more, were imprisoned for life. So also in the case of Dorsey, a stage robber and murderer. In these cases the picturesque element seems to have been decisive, since these were

55. See Pound, Introduction to Saleilles, *The Individualization of Punishment* (transl. by Jastrow, 1911) xvi f.

56. Duke, *Celebrated Criminal Cases of America* (1910).

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very dangerous criminals. Experience elsewhere, as I have gathered from the Texas Criminal Reports and the Oklahoma Criminal Reports, has been the same. Obviously, the crude individualization achieved by leaving the assessment of penalties to trial juries involves quite as commonly inequality and injustice as does mechanical application of the law by a magistrate. Upon the whole unchecked jury discretion is worse than the little checked judicial discretion or the judicial discretion checked by assigning penalties to fixed degrees of crimes which it has superseded.

In England, the discretion of the trial judge as to sentence has been checked by discretion in review of the sentence by the Court of Criminal Appeal.⁵⁷ In America, in recent years we have turned to nominal sentence and leaving the discretion or form of penal treatment to an administrative board and have added to the mitigating devices a system of parole.⁵⁸ Also at the top of the series is the executive's prerogative of commutation and pardon.

Administration of parole laws, unhappily much affected by politics, has led repeatedly to riots or mutinies in prisons because of arbitrary exercise of the powers of the boards. Some of the mitigating devices have at times been hedged about with procedural limitations. But such limitations, if they are effective to restrain what might otherwise be an intolerable mar-

57. English Criminal Appeal Act (1907) § 4(3); Orfield, *Criminal Appeals in America* (1939) chap. 5.

58. Bruce, Burgess and Harno, *The Probation and Parole System*, in *Illinois Crime Survey* (1929) 427-574; National Commission on Law Observance and Enforcement, *Report on Penal Institutions, Probation and Parole* (1931) 127-145; Wilcox, *Parole of Adults from State Penal Institutions in Pennsylvania* (1927); Pigeon, *Probation and Parole in Theory and Practice* (1942).

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gin for the personal equation of the official, are very likely to give to these devices a purely mechanical operation and thus afford opportunity for perversion of the legal provision for special cases into a means of enabling the typical offender to escape. As one looks back over the series of mitigating devices and notes how in their history at times they have been few and mechanical⁵⁹ and again at other times have been many and liberally administered, he must be struck by the necessity and yet the great difficulty of maintaining a balance between the discretion required by the social interest in the individual life, on the one hand, and the general security, on the other hand.⁶⁰

(f) In petty courts.⁶¹ It has always been recognized that a wider discretion and freer scope for judicial action are requisite in the administration of justice in small causes. Hence for a long time lay justices of the peace were taken to be the ideal tribunal. But the justices' courts of our formative era have proved to be wholly unsuited to the cities of today and have largely ceased to be satisfactory tribunals anywhere. It takes a judge who knows the law to know how and when to dispense with particular precepts. Small causes may well present quite as difficult problems as those involving large sums of money or valuable property. Small causes re-

59. E. g. benefit of clergy, and transportation in the eighteenth century. 1 Stephen, *History of the Criminal Law of England* (1883) 468-474.

60. See Pound, *The Rise of Socialized Criminal Justice*, in *Social Defenses against Crime*, Year Book of the National Probation Association (1942) 1-22.

61. Smith, *Justice and the Poor* (1919) 56-59; Schramm, *Pledpoudre Courts, A Study of the Small Claim Litigant in the Pittsburgh District* (1928).

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quire strong and well trained judges, and it is here that the administration of justice touches immediately the greatest number of people. Hence the tendency today is to set up well organized municipal courts or courts with competent judges for wider areas to determine such cases.⁶² Until recently we have been callous to the just claims of the small litigant and there is still much to be done for them.⁶³

2. *Individualization of application in the civil law.*

(a) Equity (*aequitas*, *équité*, *Billigkeit*).⁶⁴ The Roman texts frequently speak of *aequitas*. But it is not in the least a technical term and has a number of meanings of which "fairness" is the one which is significant in the present connection.⁶⁵ It was applied by the classical jurists to the *bonae fidei iudicia* and other cases in which the *iudex* was given a large margin of decision. In this sense it was often referred to the *ius naturale*.⁶⁶ In the

62. The best model is to be found in the English County Courts. See Crawford, *Reflections and Recollections* (1936) chaps. 4-10 and 14.

63. See Smith, *Justice and the Poor* (1919) chaps. 1-6; Pound, *The Administration of Justice in the Modern City* (1913) 26 *Harvard Law Rev.* 302; Pound, *Organization of Courts* (1940) 260-270. Also *post*, § 143.

64. Rümelin, *Die Billigkeit im Recht* (1921); 1 Ahrens, *Cours de droit naturel* (8 ed. 1892); Lasson, *System der Rechtsphilosophie* (1882) 238-239; Stammler, *Lehre von dem richtigen Rechte* (2 ed. 1926) 242-249—Husik's transl. from 1 ed. 1902, as *Theory of Justice* (1925) 288-299; Fabreguettes, *La logique judiciaire et l'art de juger* (2 ed. 1926) 397-402.

65. See a good discussion in Clark, *Practical Jurisprudence* (1883) 365-374; *id.* *History of Roman Private Law: I Jurisprudence* (1914) 106-113.

66. Paul in *Dig.* 1, 1, 11.

modern Roman law it was used for the margin of discretion in law finding,⁶⁷ interpretation, and application. But the nineteenth century was opposed in spirit to discretion in law finding or in application. "When the enacted law is silent, but now only in that case, the magistrate ought to make up the deficiency."⁶⁸ It is unfortunate, the author adds, that public opinion attributes the quality of a good judge to "a magistrate who puts himself above the law and applies it according to his own views."⁶⁹ In that sense equity is justice administered not according to the text of the law but according to a sentiment of natural right. It has been called "cerebrine equity" after a text of Papinian, because it is arbitrary.⁷⁰ The French Civil Code in a number of cases leaves decision to the discretion of the judge, and those cases are said to be referred to *équité*.⁷¹ The modern doctrine is the same as in the common law. There is room for discretion in application only in cases where the law provides for it. The German Civil Code makes certain provisions

67. Domat, *Lois civiles dans leur ordre naturel* (1694) liv. 1, § 2, no. 4—transl. by Strahan—1 *The Civil Law in the Natural Order* (Cushing's ed. 1850) 87–91.

68. Fabreguettes, *La logique judiciaire et l'art de juger* (2 ed. 1926) 397.

69. *Ibid.* 398.

70. *Ibid.* 399.

71. E. g. regulation of the use of water, art. 645; respite accorded to a debtor, arts. 1244, 1655, 1900; guardianship of children in case of separation or divorce, art. 320; the name of the wife in case of separation, art. 311; abatement of debts from play or wagers art. 1967; adjustment among associates, art. 1854.

20. *The Judicial Process in Action*

depend on what is practicable.⁷² Also a measure of personal judgment is required in fixing the recovery in case of infringement of interests which cannot be valued in money.⁷³ But in cases where the Roman law left the matter to the determination of a good man (*uiri boni arbitrio*) the German Civil Code sometimes lays down a rigid rule—for example, where one of a number of partners in equal shares did more toward the partnership enterprise than the others, and also through accident lost more.⁷⁴ The general result under the modern codes is substantially that to which the common-law system has come. Discretion is only to be exercised where the law itself provides for it, and its exercise, where in the nature of things that is possible, is to be guided by principles.⁷⁵

3. *Individualization of application through administrative tribunals.*⁷⁶ Administrative as contrasted with judicial application of law is characteristically a matter of discretion. Cases are assumed to be unique and are

72. §§ 1673, 1690, 1820, 1827, 1996, 2227, 2360, 2368.

73. Such cases are put in §§ 343, 847, 971, 1300.

74. Compare Dig. 17, 2, 6 with German Civil Code, § 722.

75. See Stammler's elaborate attempt to work out principles of application, *Lehre von dem richtigen Rechte* (2 ed. 1926) 118–122.

76. Freund, *Administrative Powers over Persons and Property* (1928) chap. 6; Sigler, *The Problem of Apparently Unguided Administrative Discretion* (1934) 19 St. Louis Law Rev. 261. Pound, *Administrative Law* (1942) 63–84; Landis, *The Administrative Process* (1938) 98–101; Carr, *Concerning English Administrative Law* (1941) 115–126; Laun, *Das freie Ermessen und seine Grenzen* (1910) containing full bibliography; Tezner, *Das freie Ermessen der Verwaltungsbehörden* (1924).

sought to be decided solely on the particular circumstances of the particular case. This theory of application, which is appropriate to the application of standards, tends to be carried out in the whole field of administrative activity. In the absence of the checks which make tolerable the relatively small margin now allowed for judicial discretion, the wide scope for personal judgment of administrative officials which has come to be allowed in recent years raises serious as well as difficult problems. They have been considered in another connection.⁷⁷

77. *Ante*, § 78.

Part 7

ANALYSIS OF GENERAL JURISTIC CONCEPTIONS

- 21. Rights, §§ 117–119.**
- 22. Powers, § 120.**
- 23. Conditions of Non-Restraint of Natural Freedom,
§§ 121–122.**
- 24. Duties and Liabilities, § 123.**
- 25. Persons, §§ 124–127.**
- 26. Acts §§ 128–129.**
- 27. Things, § 130.**

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Chapter 21

Rights

- § 117. Introductory Excursus—Juristic Conceptions.
 - § 118. The Conception of a Right.
 - § 119. Classification of Rights.
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Chapter 21

Rights

Section 117



INTRODUCTORY EXCURSUS—JURISTIC CONCEPTIONS. 1. *What are juristic conceptions?* What I am here calling juristic conceptions are often spoken of as “jural relations” (*Rechtsverhältnisse*).¹ I have hesitated to adopt this term since it suggests the theory of a right as a relation, as to which later. With some hesitation I have preferred to follow Bierling, who speaks of “juristic fundamental conceptions (*juristische Grundbegriffe*),”² since I prefer, as he does, to think of claims or demands recognized and made legally assertable. What gives one pause as to this term in the present connection is that “legal conception” has been used for something quite different and

1. *Recht* here is more than law. It is what is right backed by law, hence *Rechtsverhältnis* is not legal relation but jural relation. As to this term see 1 Savigny, *System des heutigen römischen Rechts* (1840) §§ 4, 52—Holloway’s translation (1867) 6–11, 269–271; id. *Jural Relations* (transl. by Rattigan, 1884) 1–2—a translation of book 2 of Savigny’s *System*, the part cited being § 60 of the original; 1 Ahrens, *Cours de droit naturel* (8 ed. 1892) § 23—*rapport de droit*, i. e. relation of right and law; 2 Wigmore, *Select Cases on Torts*, App. A, *Summary of the Principles of Torts* (1911) §§ 4–8; Kocourek, *Jural Relations* (1927) chaps. 1, 3.

2. 2 Bierling, *Kritik der juristischen Grundbegriffe* (1883) 3–4. Bierling does, however, use *Rechtsverhältnis* also. 1 *Juristische Prinzipienlehre* (1894) § 9.

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the two terms look very much alike. Legal conceptions are legally defined categories into which the facts may be put whereupon certain rules, principles, and standards become applicable.³ It is largely by means of these legal conceptions that the law can keep pace with continual and often rapid development of new instruments and devices and transactions in the economic order. Thus the conception of a common carrier, originally made for the boatman and for the carter, could extend to the stage coach, to the railway, and thence to the trolley line, to the motor bus, and to the airplane. But along with these came gas lighting, telegraph, telephone, electric light, and later electric power. The conception of a common carrier was at first made to cover these till the wider conception of a public utility was worked out from the result. Juristic conceptions are not prescribed and defined by law as legal conceptions are. They are worked out by jurists in order to systematize and expound the phenomena of the legal order, the body of authoritative grounds of or guides to decision, and the operation of the judicial process.

2. *The place of juristic conceptions in the development of law.*⁴ Primarily it is the function of juristic conceptions to provide a basis for understanding and devel-

3. *Ante*, § 58.

4. 1 Jhering, *Geist des römischen Rechts* (5 ed. 1891) § 3, particularly pp. 36-43.

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oping the body of authoritative grounds of or guides to decision.⁵

Historically law in the second sense precedes these juristic conceptions which we reach by analysis and postulate as the logical bases of legal precepts. The ideas of substantial interests to be secured and of rights by which they are made effective come late in legal development. The logical sequence is interest, right, duty, action, remedy. In order to secure the interest recognized and delimited by the law, it confers a legal right, secured by imposing a corresponding duty. To enforce the duty it allows an action, which has for its end a legal remedy. But historically the order of development is the reverse. In English law, for example, one complained to the king who gave a writ affording a remedy. Out of the writ an action developed.⁶ Behind the action men came to see a duty to be enforced, and a correlative right was found by jurists behind the duty. Recently it has been seen that behind the right is an interest (claim or demand or desire) which is recognized and delimited by the law.

5. 22 Jhering, *Geist des römischen Rechts* (5 ed. 1898) §§ 39-41—but these sections are reprinted from pt. 2 of vol. 2 as it stood in the 4 ed. (1883); 1 Géný, *Science et technique en droit privé positif* (1913) 145-164; 3 id. (1921) 175-257; 4 id. (1924) 23-46; Hohfeld, *Fundamental Legal Conceptions* (1923) 63-64; Green, *Judge and Jury* (1930) chap. 9.

6. "*Tot erunt formulae brevium quot sunt genera actionum.*" Bracton, f. 413b [no date—all references are to the folio of the 16th century ed.] The *Registrum Brevium* was "the core of nearly every other attempt at legal literature between the beginning of the thirteenth and the end of the sixteenth century." Winfield, *The Chief Sources of English Legal History* (1925) 286.

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But if the law confers legal rights and powers and privileges, imposes legal duties and liabilities, and recognizes liberties, it does not create or define the conceptions of legal right, legal power, privilege, duty, or liberty. It says when men may influence the acts of others with the backing of the force of politically organized society, when they may create or alter or direct such capacities, when men are subjected to that influence, on what occasions they are exempt from such influences, and in what fields of human activity the law will keep its hands off. Jurists analyze these prescribings of law in the second sense and find in them rights, powers, liberties, privileges, duties and liabilities which as conceptions are not defined by the law but by the jurists. They belong to the science of law rather than to the law. Hence jurists may hold different ideas as to them without affecting the law.

3. *The abuse of juristic conceptions.*⁷ I am not speaking particularly here of the so-called jurisprudence of conceptions (*Begriffsjurisprudenz*).⁸ That has to do with misuse of legal principles—of authoritative starting points for legal reasoning. As to juristic conceptions

7. Pound, *Mechanical Jurisprudence* (1908) 8 *Columbia Law Rev.* 605, 610-621; Jhering, *Scherz und Ernst in der Jurisprudenz* (1884, 13 ed. 1924) pt. 3; 1 Gény, *Méthode d'interprétation* (2 ed. 1919) 124-204; Arnold, *Criminal Attempts* (1931) 40 *Yale Law Journ.* 53, 79-80; Fuchs, *Gesunder Menschenverstand, Neu-Wiener Begriffsnetz und französische "neue Schule"* (1928) 4 *Die Justiz*, 129.

8. See *ante*, § 12.

they have been liable to misuse in three ways. One is by using the names given them as “solving words.” Thus the question of liability of the maker or vendor of a manufactured article to third persons, other than one to whom it was immediately sold, for injuries due to hidden defects was long sought to be answered by the term “duty,” where now we see that the real point is the ambit of the risk of injury imposed on others.⁹ Another is to use the name given to the conception to cover too much and applying it to different items without discrimination thus giving rise to confusion.¹⁰ On the other hand, in getting away from this confusion it is often assumed that an exact terminology rigorously applied will solve fundamental problems and difficulties of the science of law. After the problems have been solved, as far as may be for the time being, critical terminology may help express the solutions. But it does not help reach them. This was well brought out by the extravagant claims made at one time for Hohfeld’s greatly improved terminology as to rights and related conceptions.¹¹ We cannot build a fruitful science of law simply on juristic vocabulary.

9. See e. g. Rolfe, B. in *Winterbottom v. Wright*, 10 M. & W. 109, 116 (1842); Brett, M. R. in *Heaven v. Pender*, 11 Q.B.D. 503, [1883]; *Huset v. J. I. Case Threshing Machine Co.*, 120 F. 865 (C.C.A.8th, 1903); Cardozo, J. in *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696 (1916).

10. This is well discussed by Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 35-64.

11. See Stone, *The Province and Function of Law* (1946) 133.

4. “*Necessary*” conceptions and “*general*” conceptions.¹² In seeking to achieve a universal science of law through establishing the logical presuppositions of the legal order, Somló begins with Austin’s distinction between “*necessary*” juristic conceptions and “*general*” or “*pervading*” conceptions.¹³ He says: “Austin makes, so far as I know for the first time, the significant distinction between *necessary* fundamental ideas, without which a legal order in general cannot be conceived, and others which are not necessary, so that a system of legal norms can be conceived without them.”¹⁴ He goes on to show that Austin, after making this distinction, did not work it out thoroughly in detail; that he does not in his discussion keep apart necessary conceptions and those which, without being necessary, have general currency. It confuses “what is merely a general element in the content of legal systems with the logically necessary elements of the conception of law.”¹⁵ But, he adds, it was the first

12. 2 Austin, *Jurisprudence* (5 ed. 1885) 1073–1075; 1 Bierling, *Juristische Prinzipienlehre* (1894) 1; Somló, *Juristische Grundlehre* (1917) 33–37; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 35–64; 1 Roguin, *La science juridique pure* (1923) 3–35, 81–113; Tourtoulon, *Philosophy in the Development of Law* (transl. by Read, 1922) chap. 13, § 3; Kelsen, *Reine Rechtslehre* (1934) 1–9, 39–61; Pound, *Progress of the Law: Analytical Jurisprudence* (1927) 41 *Harvard Law Rev.* 174, 176–184, 177–189, 195–196; Lundstedt, *Superstition or Rationality in Action for Peace* (1925) 117–119; Duguit, *Les transformations générales du droit privé depuis le code Napoléon* (1912) 24 (transl. in *The Continental Legal History Series*, vol. XI *Progress of Continental Law in the Nineteenth Century* (1918) 74–75).

13. 2 Austin, *Jurisprudence* (5 ed. 1885) 1072–1074.

14. Somló, *Juristische Grundlehre* (1917) 33.

15. *Id.* 34.

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attempt on a large scale to identify these logically necessary conceptions and as such "belongs to the best that has hitherto been written upon the conception of law."¹⁶ In this respect Austin is held to be in advance of his followers, who have not adequately valued this fundamental idea of their master and have neglected to carry it out.¹⁷

Austin's discussion of the subject is to be found in his lecture "On the Uses of the Study of Jurisprudence." He did not include that material in his published "Province of Jurisprudence Determined," and it appeared first in the third edition of his "Lectures on Jurisprudence," published from his manuscripts after his death. This might indicate that as his study of the subject progressed he set less store by the distinction which he had made in his opening lecture. It might explain, at least in part, why his followers ignored it or did not carry it further. But if the distinction affords a valid or useful basis for analytical jurisprudence this belated recognition cannot matter.

As has been seen, Austin starts with the proposition that the subject of jurisprudence is positive law, that is, law established "in an independent political community by the express or tacit authority of its sovereign or supreme government."¹⁸ But law, as he sees it, is an aggregate of laws. The aggregate in any community forms a system or body of law. Every such system has its specific and characteristic differences. It has also "princi-

16. *Id.* 35.

17. *Ibid.*

18. 2 *Jurisprudence* (5 ed. 1885) 1072.

ples, notions, and distinctions which are common to matured or developed systems.” Jurisprudence has to do with these “principles, notions, and distinctions” which are common to matured or developed systems.¹⁹ The principles, notions, and distinctions which make up this common element in developed law are of two types. Some are “necessary.” For, he says, “we cannot imagine coherently a system of law (or a system of law as evolved in a refined community) without conceiving them as constituent parts of it.”²⁰ Other constituents of this common element are not necessary. “We may imagine coherently an expanded system of law without conceiving them as constituent parts of it.” But they rest on obvious and general grounds of utility and so are to be found very generally in matured systems of law. Accordingly, he tells us, they may properly be included in the subject matter of jurisprudence, which will embrace (1) the necessary principles, conceptions, and distinctions, without which a system of developed law cannot be conceived, and (2) an element universal not because of its logical necessity but because of the general dictates of utility leading to like results in developed communities.²¹

He does not give us any “necessary” or any “pervading” principles. Indeed, he tells us that before looking into these

19. Ibid.

20. Id. 1073.

21. Id. 1074.

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principles it will be necessary to determine accurately the meaning of terms which recur continually in every part of the science.²² Hence he proceeds to analyze and define such terms as law, right, sanction, person, thing, act. But by way of preliminary he does give us a few examples of what he deems necessary "notions" and necessary distinctions, and some examples of general or "pervading" distinctions which are not necessary.

As Austin sees it, the following are "necessary" notions: "Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society."²³ Also the following are "necessary" distinctions: (1) between "written or promulgated and unwritten or unpromulgated law . . . between law proceeding immediately from a sovereign or supreme maker and law proceeding immediately from a subject or subordinate maker;" (2) between "rights availing against the world at large" and rights "availing exclusively against persons specifically determined;" (3) between property or dominion and "the variously restricted rights which are carved out of property or dominion;" (4) between obligations arising from contracts and those arising from "incidents that are neither contracts nor injuries, but which are styled analogically obligations quasi ex contractu;" (5) between "civil injuries (or private delicts)"

22. Id. 1075.

23. Id. 1073.

and between torts and breaches of contract or of quasi contractual obligation.²⁴ An example of a "general" distinction which is not "necessary" is said to be the classification into law of persons and law of things.²⁵

None of these "necessary" distinctions can make a clear title. Even if we have difficulty in imagining as a practical system one in which all legal precepts are legislative in form, in which nothing is done by law in cases not within the four corners of written legal texts, such a system is logically conceivable.²⁶ Still more conceivable is one in which the whole body of legal precepts is traditional in form and there is no "written law." Glanvill's observation²⁷ might be said to antedate matured English law. No doubt, following Roman example, we find both legislation and tradition everywhere. But this is a matter of what Austin calls utility, or of history and limitation, not one of logical necessity. So, too, with the distinction between rights *in rem* and rights *in personam*. Hohfeld in effect argues for a threefold division; legal rights may involve relation to many others or to few others or to one other.²⁸ There is no logical necessity of the two categories as against the suggested

24. Id. 1073-1074.

25. Id. 1174-1175.

26. Compare the situation to which art. 4 of the French Civil Code is addressed. The judges refused to act in the absence of a text of the law and referred the parties to the legislative power of the king. 1 Laurent, *Droit civil français* (3 ed. 1878) nos. 254-257.

27. "For the English laws, although not written, may as it should seem, and that without any absurdity, be termed laws. . . . For if from the mere want of writing only they should not be considered as laws, then unquestionably writing would seem to confer more authority upon laws themselves than either the equity of the persons constituting them or the reason of those framing them." De legibus et consuetudinibus regni Angliae, preface (Beames' transl. xi).

28. Fundamental Legal Conceptions (1923) 71-72.

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three. Moreover, one might conceive of a system without property and without contract, as economic institutions, with a purely administrative securing of personality. Such a system would not necessarily involve this distinction. The threefold classification of obligation is even less tenable as a necessary distinction. Austin gives us the classification of Gaius in the Digest,²⁹ which is manifestly a generalization from Roman procedure. The third category is only a procedural catchall. Of the duties included, some in our law are given effect procedurally either *ex delicto* or *ex contractu*, while some are given effect *ex contractu* only, and some are made effective on a property theory by constructive trusts. Moreover, the Institutes give us a fourfold division,³⁰ and the distinction between tort (delict) and quasi tort (quasi delict) though now given over by French jurists,³¹ has been argued for the common law with much force.³² Nor can the division into civil delicts and crimes be admitted as necessary. It is quite conceivable that wrongs might be treated wholly from the one or wholly from the other standpoint.

Somló does not contend for the supposed necessary distinctions. Recognizing that they cannot be maintained and that some of Austin's "necessary notions" are not admissible as such,³³ he holds that right, duty, sovereignty, and state are necessary conceptions, presupposed logically by the very idea of the legal order.³⁴ Apparently,

29. Dig. 44, 7, 1, pr.

30. Inst. 3, 13, 2.

31. 2 Planiol, *Traité élémentaire de droit civil* (11 ed. 1932) no. 827.

32. Smith, *Tort and Absolute Liability* (1917) 3 *Harvard Law Rev.* 241, 319, 449.

33. *Juristische Grundlehre* (1917) 34.

34. *Ibid.*

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Austin held that the six "notions" which he names were necessary because logically involved in the idea of a law, law being thought of as an aggregate of laws. He derives the idea of duty from that of command,³⁵ the idea of a right from that of a duty,³⁶ and the ideas of punishment and redress from sanction, which is a logical element of the idea of command.³⁷ How he derives the ideas of liberty and injury is not so clear. Probably liberty is taken to be involved in "a right,"³⁸ while injury is said to be a cause or antecedent of certain rights.³⁹ Gray seems to be in error in supposing that Austin meant that these conceptions were metaphysically necessary or necessary in the nature of things.⁴⁰ Rather he meant that assuming his definition of law, these conceptions were necessarily logically presupposed. Somló begins not with the idea of law (second sense) but, as might be expected of a twentieth-century jurist, with the idea of the legal order. Right (i. e. a right), duty, sovereignty (in the juristic sense),⁴¹ state, are conceptions necessarily implied in or

35. 1 Austin, *Jurisprudence* (5 ed. 1885) 89.

36. *Id.* 33.

37. *Id.* 89, 91-92.

38. *Id.* 356. Note that Mr. Justice Holmes defines a right in terms of a liberty, *The Common Law* (1881) 214.

39. 1 *Jurisprudence* (5 ed. 1885) 43-44.

40. *Nature and Sources of the Law* (1 ed. 1909) § 296, (2 ed. 1921) 136-137. See Somló, *Juristische Grundlehre* (1917) 37.

41. *Ante*, § 71. As to state, this assumes a definition of the legal order as a regime of adjusting relations and ordering conduct by application of the

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presupposed by the legal order and so give us an assured foundation for a science. But state and sovereignty are primary ideas, while "a right" and duty are derived. Thus we get substantially the starting point for an analytical theory which Kelsen reaches from another side.

If we conceive of the legal order as a regime of securing interests, then "a right," in the sense of legally recognized and delimited interest, is a presupposition. But it has long been understood that "a right," as used in such discussions, is a composite idea. It may mean the legally recognized and delimited human want or demand, or some one of the conceptions by which that recognized interest is given form in order to be secured by the legal order, or the complex of these conceptions plus the recognized and secured interest. Usually Austin and his followers have in mind the last of these meanings. But they have in mind a narrower meaning when they speak of a right as having a correlative duty. For, as is well understood today, the legally recognized and delimited interest may be secured by a legal right with a correlative duty, or by a power, or by a liberty, or by a privilege.⁴² Of the compound of recognized-and-delimited-interest and assertive-capacity-with-correlative-duty, which Austin and Holland have called a right, the former may be

force of a politically organized society. If, with the historical jurists and recent sociologists, we take all social control to be law we should have to postulate an "institution" in Hauriou's sense. See *ante*, § 27.

42. *Post*, §§ 118, 119.

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a necessary conception in Austin's sense and in Somló's, but the latter is not. In the law as it is and has been since the seventeenth century the latter is quite as important as the former. Yet may we not conceive of a system so completely administrative rather than contentious in its methods that it recognizes or confers no capacity in the individual to initiate any proceeding, holding all duties absolute (in Austin's sense),⁴³ to be enforced only on the initiative of state officials? There is something of this in the canon law. The proceeding in the ecclesiastical court against a respondent *pro salute animae* was "the office of the judge promoted by Simpkins against Bullock for his soul's correction." Is it not conceivable that in a system which, as Austin postulates, is a body of commands addressed by sovereign to subject, or in recent phrase a body of norms established by politically organized society, there might be no individual promotion of the office of the judge—the magistrate might act in substance as well as in form on his own initiative? What has been said of "a right" as a supposed necessary conception largely disposes of duty. Austin's distinction between absolute duties and relative or correlative duties⁴⁴ seems to be well taken. If right in the sense of capacity of asserting legally recognized interests is not a necessary conception, neither is the correlative necessary.

43. 1 Jurisprudence (5 ed. 1885) 65–66.

44. Ibid. See also id. 401–402.

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On the other hand, Austin's absolute duty does seem to be necessary in his sense. It seems logically implied in any legal ordering of human relations that individuals shall be subject to a compulsion of obeying the precept established or recognized by that legal order. The legal order postulates subjection of individual men to politically organized society. Absolute duty in Austin's sense is an implication of sovereignty.

Thus the list of necessary conceptions reduces to four, namely, state, sovereignty, absolute duty, and legally recognized and secured interests. Are these ideas enough for an analytical jurisprudence or a pure science of law? One may use them after the manner of mathematical logic and draw out certain conclusions which, so long as we eliminate all elements of conflict or overlapping of interests, valuing of interests and choice of starting points in interpretation, application and development of precepts, and choice of means in securing the interests recognized and delimited, will seem to give universally valid results. But these results are universally valid because and so long as they exclude the very things for which we need and use a science of law. The moment we are out of Cloudeuckootown and come to deal with the persistent problems of the actual legal order, we are dealing with conceptions and doctrines which are not "necessary" and we require a different apparatus. For juristic purposes it is of much more moment to trace the development of the ideas of "a right," duty, liberty, privilege,

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and the like in legal history and perceive how conceptions taken over from morals have become legal and then have gone back in part from law to morals, ethical thinking liberalizing the law and law giving more clarity to ethics, than to seek to derive these conceptions a priori after the event.

§ 118. THE CONCEPTION OF A RIGHT. 1. *Meanings of the term "a right."*¹ There is no more ambiguous word in legal and juristic literature than the word right. In its most general sense it means a reasonable expectation involved in civilized life. As a noun, it has been used in five senses in the law books. (1) One meaning is interest, as in most discussions of natural rights. Here it may mean (a) an interest one holds ought to be recognized and secured. It is generally used in this sense in treatises on ethics. Or (b) it may mean the interest recognized, delimited with respect to other recognized interests, and secured. (2) A second meaning is a recognized claim to acts or forbearances by another or all others in order to make the interest effective, (a) legally, through application of the force of a politically organized society to secure it as the law has delimited it, or (b) morally, by the pressure of the moral sentiment of the community or of extra-legal agencies of social control.

1. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 6-12; Pound, *Legal Rights* (1915) 26 *International Journ. of Ethics*, 92; 1 Beale, *Conflict of Laws* (1935) 62-70, 79-86; Stone, *The Province and Function of Law* (1946) chap. 5; Paton, *Jurisprudence* (2 ed. 1951) § 60.

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Analytical jurists have put this as a capacity of influencing others which is recognized or conferred in order to secure an interest. (3) A third use is to designate a capacity of creating, divesting or altering rights in the second sense and so of creating or altering duties. Here the proper term is "power." (4) A fourth use is to designate certain conditions of general or special non-interference with natural faculties of action; certain conditions, as it were, of legal hands off, i. e. occasions on which the law secures interests by leaving one to the free exercise of his natural faculties. These are better called liberties and privileges. (5) In addition, "right" is used as an adjective to mean that which accords with justice or that which recognizes and gives effect to moral rights. In Latin *ius* has the further ambiguity of also meaning law. This is true also of the corresponding words in modern languages, *Recht*, *droit*, *diritto*, *derecho*, *direito*. An example of use of "a right" to include the second, third, and fourth meanings, or in other words, the complex of conceptions by which a right in the first sense is secured, may be seen in the conventional civilian analysis of *dominium*.² According to this analysis, *dominium* includes (1) *ius possidendi* (a legal right—second meaning), (2) *ius utendi* (a liberty—fourth meaning), (3) *ius fruendi* (a liberty—fourth meaning), (4) *ius abutendi* (a liberty—fourth meaning), (5) *ius disponendi* (a

2. See Hearn, *Theory of Legal Duties and Rights* (1883) chap. 10.

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power—third meaning), and (6) *ius prohibendi* (a legal right—second meaning). But all are said to make up the “content” of a right of ownership. It is often convenient, particularly in connection with the conflict of laws, to use the term “right” for the whole complex of these capacities of influencing the action of others. But this compels us to distinguish a broader sense of “a right” and a narrower or stricter sense.

2. History of the conception of “a right.”

(1) **Origins in Greek philosophy.**³ Greek philosophers were treating of social control as a whole, of the just man, of justice as a virtue rather than as a regime, and of laws rather than of law. They had the idea of duty: τὸ καθῆκον that which is meet or fit, becomes duty and gets to be a legally recognized or legally established moral duty. They differentiate justice as a virtue, δικαιοσύνη the character of a just man, from τὸ δίκαιον, that which is right and just, and so justice. Plato uses δικαιοσύνη for justice in the sense of the business of a judge⁴ and Aristotle uses δικαιοσύνη δικαστική for legal justice.⁵ In late usage τὸ δίκαιον is used for Latin *ius*.⁶ Rights are not discussed. But there are uses of τὸ δίκαιον, in literature which approach the idea, using the term for a lawful claim⁷ or τοῦμόν δίκαιον for justice applied to my case.⁸ There is no clear idea of a right.

3. Aristotle, Nicomachean Ethics, v, 2, 8-9, v, 4, 1-8, v, 7, 5-6; Cicero, De officiis, 1, 3; Diogenes Laertius, vii, 108.

4. Gorgias, 464 B.

5. Politics, iv, 4, 14.

6. In Pseudo Plato, On Justice, St. iii, 372a, τὸ δίκαιον is *ius* or justice or what is right with no differentiation.

7. Demosthenes, Against Midias, 572, 14; Thucydides, iii, 54.

8. Euripides, Iphigenia in Aulis, 810.

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(2) **Origins in Roman procedure.** The Roman books distinguish actions *in rem* and actions *in personam*. "This distinction," says Buckland, "corresponding to our modern classification of rights *in rem* and *in personam*, was based not on what seems to us the primary distinction, that between the rights, but on what was to the Romans the primary distinction, that between the remedies."⁹ The action *in rem* was an action for a physical thing. The action *in personam* was in origin an action against one who was judicially or formally condemned to a payment so that there was a claim to his person.¹⁰ They came to be, as we look at them today, means of enforcing rights against the world at large and rights against particular persons respectively. But the Romans did not look at remedies in terms of rights. It took analytical study of the Roman texts in modern times to yield that idea.

(3) ***Ius* in Roman law.**¹¹ The term which we translate as "law" or as "right," or as "a right" has a great variety of meanings. At least ten deserve to be set out: (a) What is right and just, in reason, in morals, or in ethical custom;¹² (b) law—what is legally established as right and just;¹³ (c) a law or a legal precept;¹⁴ (d) legal institution—rightful or customary institution legally recognized or established;¹⁵ (e) presence of a magistrate—where right and justice may be had;¹⁶

9. Text Book of Roman Law (2 ed. 1932) 674.

10. Gaius, 3, 174; 4, 1-5, 21-25; Inst. 4, 6, 1-14.

11. Maine, Early Law and Custom (English ed. 1883) 365; 1 Glück, Ausführliche Erläuterung der Pandekten (2 ed. 1797, reprinted 1867) § 1.

12. Dig. 1, 1, 1, pr. and 1; Dig. 1, 1, 10-11.

13. Inst. 1, 2, 1-3; Dig. 1, 1, 6; Dig. 1, 1, 11. In Gaius *ius* is the strict law, as distinguished from the praetorian law. Gaius, 2, 146, 198; 3, 75; 4, 60.

14. Dig. 1, 3, 35; 12, 1, 1; 22, 3, 5; 50, 17, 82.

15. Gaius, 1, 55, 112, 129, 158.

16. Dig. 2, 3.

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(f) political capacity;¹⁷ (g) authority—legally backed customary or moral authority;¹⁸ (h) power—a legally backed moral or customary power;¹⁹ (i) a liberty—rightful liberty legally recognized;²⁰ (j) legal position—rightful position under a rule of law, legally conferred advantage.²¹ There is no clear differentiation and no clear conception of “a right”.

(4) *Ius* from the twelfth to the sixteenth century. In the Glossators and Commentators there is little advance on the Roman texts.²² Also in the scholastic philosophers there is no clear setting off of a right, but there is suggestion of a just claim as a distinct conception.²³ But in the sixteenth century Donellus distinctly sets off *iur* as “a right” from *iur* as what is right backed by law.²⁴

(5) *Rectum*, right, in medieval law. In medieval law Latin *rectum* is used as equivalent to *iur* in most of its meanings, tending to become “that which is right applied to my case.”²⁵ It is often used as a synonym of *justitia*.²⁶

17. E. g. *iur suffragii, iur honorum*.

18. E. g. *iur imperandi*, Dig. 9, 2, 37, pr.; *iur patris*, Collatio, iv, 7; persons *alieno iuri subiecti*, Inst. 1, 8, pr.

19. E. g. *iur donandi, uendendi, concedendi*, Dig. 50, 17, 163, *iur testamenti faciendi*, Dig. 18, 1, 6, pr.

20. Dig. 50, 17, 55.

21. E. g. *iur Latii*, Gaius, 1, 95; *iur trium liberorum*, Gaius, 1, 145, 194; 3, § 44; Ulpian, Regulae, iii, 1, xix, 3; *iur cognationis*, Dig. 1, 1, 12.

22. Gloss, “*iur quid sit*,” on rubric to Sext, De req. iur.; Johannes Andrae on id.; Bartolus on Dig. 1, 1, 1.

23. Thomas Aquinas, II-II, q. 57, arts. 2-4.

24. 1 De iure ciuili, 3, 2-4 (1589).

25. Du Cange, Glossarium ad scriptores mediae et infimae Latinitatis, sub voc. *Rectum*; Fleta, vi, c. 1, § 1 (c. 1290). See Winfield, The Chief Sources of English Legal History (1925) 262-263. See Co.Lit. (1628) 158b, 266a, 345a-b.

26. E. g. Magna Carta, cap. 40 (1215).

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(6) **Natural rights—the transition from natural law to natural rights.**²⁷ Natural law, a postulated ideal system of precepts of universal validity and applicability, demonstrated by reason which afforded an all sufficient basis, came to be held to involve natural rights—moral qualities of men by virtue of which they ought in ideal law to have certain things or be able to do certain things. This doctrine of natural rights was an outgrowth of Protestantism and was given full political development by the Puritans in seventeenth-century England, was formulated philosophically by Locke ²⁸ and set forth as a political dogma in the American Declaration of Independence and the French Declaration of the Rights of Man (1791). Since in the theory of natural law whatever ought to be law morally therefore was of itself legal, the interests which in reason ought to be recognized and secured were by that fact legal rights. These ideal claims or interests were treated as binding beyond the reach of any lawmaking. But in practice the interests recognized and secured by the positive law and the complex of conceptions by which the positive law gave them effect were given ideal form and identified with natural rights. There was no differentiation of the interest and the several conceptions by which it is secured.

(7) **The idea of a legal right in the nineteenth century.** Donellus had distinguished *ius* as law from *ius* as a right.²⁹ But the word we translate as “law” meant what is right backed by the state. Thus an ethical idea was made to stand out both in *ius*, law, and in *ius*, a right. The latter was taken to be the former put subjectively. *Ius* as “law” was objective right (*droit*

27. Grotius, *De iure belli ac pacis* (1625) I, 1, 4; Hobbes, *Leviathan* (1651) chap. 14; Dunning, *Political Theories from Luther to Montesquieu* 272-276; Ritchie, *Natural Rights* (1895) chaps. 1-2.

28. *Two Treatises of Government* (1685) chaps. 2, 5, 6.

29. Note 24 *supra*.

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objectif, objektives Recht).³⁰ Since the one word, *ius, droit, Recht*, was used for each there was an attempt to unify "law" and "a right" in this way. English analytical jurists were not embarrassed by any such ambiguity of the word used for a right. Law, a right, and right (i. e. what is ethically approved) served to distinguish the legal and the ethical and to differentiate the body of precepts from the reasonable expectations which they defined and sought to secure. But Austin indicated a distinction between natural capacities with which the law did not interfere and capacities conferred and secured by law.³¹ Brinz distinguished liberty (*Dürfen*) from power (*Können*) as components of a right³² and this led to setting off of a right (in the narrower sense), a liberty, and a power as distinct juristic conceptions.³³ In the meantime Jhering had distinguished the interest from the juristic conceptions by which it is given effect, although he thought of a right as a secured interest.³⁴

(8) Complete differentiation in the present century. Except that he followed Jhering in defining a legal right as a secured interest and so did not distinguish the secured and delimited interest from the legal rights in the narrower sense, powers, liberties, and privileges by which it is secured, Salmond

30. Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) no. 2; 1 Windscheid, *Pandekten* (1 ed. 1862) § 37; 1 Savigny, *System des heutigen römischen Rechts* (1840). Savigny preferred *Rechtsverhältnis* to *Recht im subjectiven Sinne*. So also Regelsberger, *Pandekten* (1893) § 13.

31. 1 Jurisprudence (5 ed. 1885)—notes first printed in 1 ed. 1863, pp. 366-367, but written before 1833.

32. 1 *Pandekten* (1 ed. 1857) § 23. He points out that Roman law in effect made the distinction as one between *licere* and *posse*.

33. Thon, *Rechtsnorm und subjectives Recht* (1878) chaps. 4-6; 2 Bierling, *Kritik der juristischen Grundbegriffe* (1883) 128-149.

34. 31 *Geist des römischen Rechts* (2 ed. 1871) §§ 60-61.

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carried forward the differentiation,³⁵ and it has been elaborated by Hohfeld³⁶ and Kocourek,³⁷ of whom later.

3. *Theories of "a right."*

(1) **The natural-law theory.** According to Grotius a right is "a moral quality by which a person is competent to have or to do a thing justly."³⁸ Because of such a quality, making it just and right for him to have something or do something, or by force of which something is owed to him, he is morally justified in controlling for his own benefit the volition of another.³⁹ It was held to be the task of the positive law to give effect to this moral quality—to make the natural-law conception a conception of positive law. So in this mode of juristic thought a legal right is a moral quality of a person recognized and secured by the authoritative precepts for adjusting relations and ordering conduct established in or by a politically organized society. It will be noticed that the natural-law theory includes the interest, legal right in the narrower sense, liberty, and perhaps power in one conception of a recognized and secured quality. It is more adapted to broad discussions of "the right of property" or the "right of personal liberty" and the like than to understanding and exposition of the juristic conceptions by which the claims as to personality, domestic relations, and substance, asserted in title of the individual life are secured in private law in a modern system.

35. Jurisprudence (1 ed. 1902) §§ 72, 74-76.

36. Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 Yale Law Journ. 16, 30 ff.

37. Jural Relations (1927) 1-2, 4-6.

38. De iure belli ac pacis (1625) i, 1, 4. So 1 Pufendorf, De iure naturae et gentium (1672) i, 30; 1 Rutherford, Institutes of Natural Law (1754) 2, § 3.

39. Phillips, Jurisprudence (1863) 6-8, 27.

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(2) **Metaphysical theories—a right as securing the free will.**⁴⁰ In these theories the moral qualities of the natural-law theory are replaced by the will. It is held that the task of the law is to assure the maximum of free individual self-assertion. Hence free exertion of the individual will is to be assured to the extent compatible with free exercise of their wills by all others. It is taken that this is to be done by universal rules fixing limits to the activities of each which will permit like activities of all. Exercise of the will within those limits is a right, and the items of free exercise of the individual will so assured are rights. A right, therefore, was said to be “a power over an object which by reason of the right is subjected to the will of the person entitled.”⁴¹ What is said above as to the natural-law theory has some application here. It should be noted that a right is defined in terms of power. Also, as is characteristic in the nineteenth century, interests of personality are included under interests of substance and interests of substance are stated in terms of property.

(3) **A right as what is right put subjectively.**⁴² If, as the Romans thought, law is what is right backed by the authority of the state, a right may be thought of in the same way as what is right in respect to the claim he makes or interest he asserts backed by the law. So far as they thought of such a

40. Kant, *Metaphysische Anfangsgründe der Rechtslehre* (2 ed. 1798) xliv–xlvii, 55–56—Hastie's transl. *Kant's Philosophy of Law* (1887) 55–59, 131–132; Miller, *The Data of Jurisprudence* (1903) 50–51—131–132.

41. 2 Puchta, *Cursus der Institutionen* (9 ed. 1881) § 207—the second edition, revised and added to by Puchta, appeared in 1846. The formula is Hegelian. See Hegel's theory of property, *ante*, § 85.

42. 1 Windscheid, *Lehrbuch des Pandektenrechts* (9 ed. 1906) §§ 37, 37a; Schuppe, *Der Begriff des subjektiven Rechts* (1887) chap. 2; Affolter, *Untersuchung über das Wesen des Rechts* (1889) 36–43; Jellinek, *System der subjektiven öffentlichen Rechte* (2 ed. 1905) 54–93; Pagel, *Beiträge zur philosophischen Rechtslehre* (1914) 85–123—critique of Schuppe. See Capitant, *Introduction à l'étude de droit civil* (4 ed. 1923) no. 74.

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thing as a right, this was what the Roman jurists held. The nineteenth-century Pandectists, following the metaphysical jurists, expressed it in terms of the will and of power or authority.⁴³

In this way of putting it, law is "objective right" and a right is "subjective right." Criticism of the term "subjective right" becomes common in the present century.⁴⁴ The terms are awkward and happily are not needed in English, since we have distinct words for right (what is just), a right, and law.

(4) **Jural relations—a right as a relation.**⁴⁵ Following Savigny, historical jurists restated the theory of the metaphysi-

43. "The legal order (*Recht* in the objective sense, objective right), on the basis of a concrete situation of fact, puts forth a command, requiring conduct of a certain sort, and puts this command at the free disposition of the one for whose benefit it was issued. It leaves it to him whether or not he will make use of the command and in particular whether or not he will put in action the means afforded by the legal order against those who disobey it. His will is determining for the carrying out of the command issued by the legal order. The legal order has made its command his command. What is right has become his right."

"A right is a power or authority of the will conferred by the legal order."—I Windscheid, *Lehrbuch des Pandektenrechts* (9 ed. 1906) § 37—the same in 1 ed. 1862.

44. 3 Géný, *Science et technique en droit privé positif* (1921) 212 ff.; 1 Roguin, *La science juridique pure* (1923) §§ 87-93; 1 Duguit, *Traité de droit constitutionnel* (1 ed. 1911) no. 1, cf. id. (2 ed. 1921) 6-11; Tasic, *Sul concetto di diritto soggettivo* (1928) 8 *Revista internazionale di filosofia del diritto*, 240; 2 Gorvtseff, *Études de principologie du droit, Théorie du sujet de droit* (1928).

45. Wigmore, *Summary of the Principles of Torts* (Cases on Torts (1912), vol. 2 app. A), §§ 4-8; Korkunov, *General Theory of Law* (transl. by Hastings, 1900, 2 ed. 1922) §§ 27-29; Kocourek, *Jural Relations* (1927) chaps. 1, 3 (reprinted with some changes from *Basic Jural Relations* (1923) 17 *Illinois Law Rev.* 515, and *Various Definitions of Jural Relation* (1920) 20 *Columbia L.Rev.* 394); Paton, *Jurisprudence* (2 ed. 1951) 219. 1 Savigny, *System des heutigen römischen Rechts* (1844) §§ 4, 52-53; Puntchart, *Die fundamentalen Rechtsverhältnisse des römischen Privatrechts* (1885) §§ 7-8; Herkless, *Lectures on Jurisprudence* (1901) 84-88; Stammler, *Theorie der Rechtswissenschaft*

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cal school in terms of relation, an idea which Savigny seems to have taken from the Middle Ages. If, he says, we consider the jural and legal order—the order of right and law—“which surrounds and presses on us from every side,” there stands out the power of the individual; the “sphere in which his will rules, and rules with our concurrence.” This power of the individual, Savigny tells us, is called his right, meaning his authority. But a deeper foundation is needed and is found in the idea of jural relation (*Rechtsverhältnis*).⁴⁶ Each jural relation, he goes on to say, “is a relation between person and person determined by a rule of law” (i. e. of *Recht*, right-and-law). “A sphere is assigned to the individual will in which it may govern independent of the wills of others.”⁴⁷ Kohler, who in some respects carries forward the ideas of the historical school, defines a right as “a relation sanctioned and protected by the legal order.”⁴⁸

(5) A right as liberty. This is primarily an English idea. The medieval charters are charters of liberties.⁴⁹ In the seventeenth century, the rise of the theory of natural rights leads to putting the received condition of noninterference with natural faculties of men as rights.⁵⁰ But Hobbes⁵¹ and

(2 ed. 1923) 124–126, 135–138; I Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) §§ 44–46.

46. 1 *System des heutigen römischen Rechts* (1840) § 4.

47. *Id.* § 52.

48. *Einführung in die Rechtswissenschaft* (5 ed. 1919) § 6.

49. “Omnes autem istas consuetudines praedictas et libertates quas nos concessimus in regno nostro tenendas”—i. e. all customary laws and liberties. *Magna Carta*, cap. 60 (1215). Cf. Fortescue, *De laudibus legum Angliae*, cap. 36 (about 1468).

50. E. g. *The Petition of Right* (1628) art. 11 claims “rights and liberties.” Also the *Bill of Rights* sets forth that it vindicates “ancient ‘rights and liberties.’” 1 *William & Mary*, St. 2, chap. 2 (1689).

51. “Right consisteth in liberty to do or to forbear: whereas law bindeth to one of them: so that law and right differ as much as liberty and obligation.”

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Locke⁵² define a right as a liberty. Holmes followed the English political tradition in this respect.⁵³

(6) A right as a secured interest.⁵⁴ It was a great step forward when Jhering differentiated the interest, the claim or want or demand asserted by an individual, from the juristic conception by which it is secured. But he did not bring out that the secured interest is not the whole of what jurists had been calling a right. He defined a right as "an interest protected by law."⁵⁵ Salmond adopted this idea of a right,⁵⁶ but set off the different juristic conceptions by which a right in Jhering's sense is secured. Merkel pointed out that the term suggested both power and interest: "A power to exact a particular act or forbearance, service or benefit, and a particular interest on account of which the power exists, from which it derives its value, with respect to which its form is determined, and which it serves to protect." He considered that the legal

Leviathan (1651) chap. 14. "Right is liberty, namely, that liberty which the civil law leaves us." *Id.* chap. 26.

52. "A liberty to follow my will in all things where that rule [i. e. a standing rule applicable to all and made by the lawmaking authority] prescribes not." *Two Treatises of Government* (1685) II, chap. 4. Cf. "By private civil right we can mean only the liberty every man possesses to preserve his existence, a liberty limited by the edicts of the sovereign power and preserved only by its authority." Spinoza, *Tractatus Theologia-Politicus* (1670) chap. 16.

53. "A permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of public force." That is, a liberty backed by the force of the state. *The Common Law* (1881) 214.

54. Salmond, *Jurisprudence* (1902) §§ 70-74; Korkunov, *General Theory of Law* (transl. by Hastings, 1909—the first ed. in Russian, 1887) § 22; Gareis, *Science of Law* (transl. by Kocourek, 1911—the first ed. in German, 1887) 31-35.

55. 3 *Geist des römischen Rechts* (1865) § 60.

56. *Jurisprudence* (1902) § 72.

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right (as he puts it, the right itself) was power. "It is related to the interest as the fortification to the protected land."⁵⁷

(7) **A right as a policy—the social interest in the general security put in terms of a right.** Sometimes a policy as to the security of acquisitions, the social interest in the general security in its phase of an interest in the security of acquisitions is spoken of as a "right of property"—not the right of an individual in certain property but a rightful claim of abstract property personified to be secured by law.⁵⁸

(8) **A right as a power or capacity.**⁵⁹ Since Austin, English analytical jurists have generally defined a legal right in terms of capacity or power. He says: "The capacity or power of exacting from another or others acts or forbearances."⁶⁰ Holland puts it thus: "A capacity in one man of controlling, with the consent or assistance of the state, the actions of oth-

57. *Juristische Encyklopädie* (1885) § 159, note. Compare: ". . . legal rights [are] the product of the recognition and protection of interests by law." Keeton, *Elementary Principles of Jurisprudence* (1930) 96. But this is omitted in 2 ed. (1949) 132.

58. "The law punishes the larceny of property, not solely because of any rights of the proprietor, but also because of its own inherent legal rights as property." Shaw, C. J. in *Commonwealth v. Rourke*, 10 Cush. (Mass.) 397, 399 (1852). See also *Property, Its Duties and Rights, Historically, Philosophically, and Religiously Considered, Essays by Various Writers* [Hobhouse and others] (2 ed. 1913).

59. 1 Austin, *Jurisprudence* (1 ed. 1861) lects. 12, 16; Gray, *Nature and Sources of the Law* (1 ed. 1909) §§ 22-62 (2 ed. 1921) 7-26; Holland, *Elements of Jurisprudence* (13 ed. 1924) chaps. 7-8; Pollock, *First Book of Jurisprudence* (6 ed. 1923) 61-72; Markby, *Elements of Law* (6 ed. 1905) §§ 146-160; Hearn, *Theory of Legal Duties and Rights* (1883) chap. 8; Terry, *Leading Principles of Anglo-American Law* (1884) §§ 113-117; Amos, *Science of Law* (1874) 89-97; Rattigan, *Science of Jurisprudence* (4 ed. 1919) §§ 11a-20b; Miller, *The Data of Jurisprudence* (1903) 131-132; Brown, *The Austinian Theory of Law* (1906) 192-193. Compare: "The legally guaranteed power to realize an interest." Allen, *Legal Duties* (1931) 183.

60. 1 *Jurisprudence* (5 ed. 1885) 398. But first in 1 ed. 1861.

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ers.”⁶¹ But this way of defining a right was criticized by Markby⁶² and given up by Salmond.⁶³ Following Austin, Terry derives right from duty, but considers that they are different sides of a jural relation.⁶⁴ If we approach the matter from the threat theory of a law, a legal right may seem to be a result of the duty (in Austin’s sense) created by the threat. If, however, we approach from the idea of a right as a secured interest, we may think of a duty as the result of a right. It might be added that the idea of a legal right as a capacity is in the right line of descent from the idea of a natural right as a quality. A moral quality has become, through the backing of politically organized society a legal power or capacity. But in the adjustments or compromises which become necessary in recognizing, delimiting, and securing interests it happens not infrequently that as a result of experience developed by reason it becomes necessary to confer such a capacity with no other moral basis than a general moral obligation to maintain the legal order. Hence although the term “a right” in general understanding implies an expectation grounded in morals, the analytical jurists have been well advised in excluding a moral basis as a necessary element.⁶⁵

(9) A right as a legally assertable claim.⁶⁶ After the Pandectists began to distinguish a legal right in the stricter sense from other components of a right in the wider and more

61. Elements of Jurisprudence (13 ed. 1924) chap. 7. But first in 1 ed. 1880. See also Terry, Leading Principles of Anglo-American Law (1884) § 109. Hibbert, Jurisprudence (1932) 192; Jenks, The New Jurisprudence (1933) 176.

62. Elements of Law (6 ed. 1905) § 146. But first in 1 ed. 1871.

63. See *supra*, note 56.

64. Leading Principles of Anglo-American Law (1884) § 114.

65. See *ante*, § 68.

66. Thon, Rechtsnorm und subjectives Recht (1878) chap. 5; 2 Bierling, Kritik der juristischen Grundbegriffe (1883) 49–73; Somló, Juristische Grundlehre (1917) §§ 125–126.

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general sense, the legal right having a correlative duty was given a name of its own (*Anspruch*) and defined as a legally assertable claim.⁶⁷ Thus by the end of the last century a legal right had come to be defined as a secured interest, or as a capacity of asserting a secured interest, or as a claim that could be asserted in the courts.

I prefer to follow the English analytical jurists and think of a capacity of assertion rather than of an assertable claim. The ideas which must be kept apart in thinking of legal rights are (a) the *de facto* demand or desire (interest); (b) the interest as recognized, delimited, and so far as may be secured by law (secured interest) (c) one of the juristic conceptions by which the recognized interest is sought to be made effective (legal right—right in the narrower or stricter sense); and (d) the recognized and delimited interest and the complex or bundle of juristic conceptions by which it is sought to be secured, thought of as one. If we define the third in terms of claim, we put in the foreground the idea of interest, whereas we are defining something conferred by law to make the interest effective. The interest exists independent of law. So far as the law has to do with it as such, it is recognized and delimited. The capacities of asserting it before courts and administrative agencies by which the interest is given efficacy are some conferred and some recognized. A right in the stricter sense, a capacity with a correlative duty, is conferred by law. It has no existence except as the law attributes it to the person entitled,⁶⁸ in contrast to the interest, which has a *de facto* basis and gets its legal significance from recognition, even if only within legally defined limits. The capacities of creating, divesting or altering legal rights in the stricter sense or of creating liabilities, as means

67. Thon, *Rechtsnorm und subjectives Recht* (1878) chap. 5.

68. "Just so far as the aid of the public force is given a man, he has a legal right." Holmes, *The Common Law* (1881) 214.

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of securing recognized interests (legal powers) are some conferred and some recognized. The power of a wife to bind her husband for necessities furnished her is conferred by law. The power of an agent to bind his principal is given to the agent by an act of appointment, to which the law gives recognition and the intended effect. The capacities of unrestrained exercise of one's natural faculties, such as the liberties of using, enjoying, or even destroying which the law attributes to the owner of an item of property, are recognitions of *de facto* faculties and not conferred like the legal right of excluding others. The exemptions on certain occasions from liability for what would otherwise be infringements of legal rights, are sometimes conferred, as in case of emergency privileges, but sometimes recognized, as in case of licenses, where the exemption is attributed to the act of the licensor, recognized as a legal transaction. But there may be licenses "by operation of law" which are conferred privileges. In each type of privilege the law secures an interest of the person acting, leaving his natural faculties unrestrained on certain occasions. Moreover, in all of these juristic conceptions through which recognized and delimited interests are secured, there is a capacity of asserting them before courts and administrative agencies.

(10) Rejection of the term "a right"—the conception of secured social functions.⁶⁹ Reaction from ideas of natural rights, classical in French public law, difficulties in adjusting theories of individual rights to the activities of the service state, and justified dissatisfaction with the terminology which puts law and right and rights in one word and employs the awkward *droit objectif* for law and *droit subjectif* for "a right," led Duguit to

69. Duguit, *Les transformations générale du droit privé depuis le Code Napoléon* (1912) 24, transl. in *Progress of Continental Law in the Nineteenth Century* (11 Continental Legal History Series, 74-75); *id.* *Objective Law* (1920) 20 *Columbia Law Rev.* 817, 822-825. See Pound, *Progress of the Law: Analytical Jurisprudence* (1927) 41 *Harvard Law Rev.* 174, 195-196.

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give up the term, if not wholly the idea of "a right."⁷⁰ As between subjective right (a right) and objective right (law) in the idea of *Recht* (right plus law) Jhering subordinated the first to the second. Duguit would do away with the idea of what-is-right-thought-of-subjectively and the term "subjective right," and would define objective right (law) only. He would treat secured individual interests in quite another way, as secured social functions. His articles in the *Columbia Law Review* in which his doctrine is set forth for readers of English must be read with caution. The translator often has made Duguit's argument all but unintelligible by translating *droit objectif* as "objective law." Duguit is not discussing two kinds or two ideas of law. He is trying to disengage from the meanings of the word *droit* the one which refers to "a right." The way to do that, as he sees it, is to take "a right" out of the supposed conception of "right-law," and put the idea of "a right" in a new way. Many who know Duguit's theory only from the English of these articles have been much misled.

In his objections to "a right," Duguit follows Comte, who declared that the word *droit* ought to be cast out from the philosophical vocabulary along with the word "cause." Duguit urges that a conception of society which sees only a coming to-

70. "In what, then, does this notion of social function consist? It comes to this: The individual man has no rights, nor has the collectivity rights. To speak of the rights of the individual and of the rights of society, to say that we must reconcile the rights of the individual with those of the collectivity, is to speak of things which do not exist. But every individual has a certain function to perform in society, a certain task to carry out. He cannot be allowed not to perform this function, he cannot be allowed not to carry out this task, because a derangement or at least a prejudice to society would result from his refraining. Moreover, every act which he does, contrary to the function which devolves upon him, will be socially repressed. But conversely, everything which he does to accomplish the mission which is his because of the place he occupies in society will be socially protected and guaranteed."—Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (1921) 24.

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gether of individuals to safeguard their respective liberties, a pact imposing only restrictions on the "right" of each necessary to insure the "rights" of all, is insufficient to account for positive functions assumed by the state, such as the care and education of children. Such obligations of the state are essentially social. Man is a social being. He can live only in society. He has always lived in society. Law is nothing else than a rule of social conduct imposed upon men under a social sanction. It is necessarily social and hence objective—i. e. *droit* is necessarily *droit objectif*. The idea of law is a social idea. The idea of "a right" is not. Hence, he argues, only the objective side of *droit* is to be retained. It is not so much Mark Twain's case of "another man of the same name." It is the same man with another name.

(11) Breach of duty made the elementary conception instead of right.⁷¹ For much the same reason but on the basis of Neo-Kantian rather than a sociological natural-law doctrine, and as a logical development of the threat theory of a law, Kelsen puts the matter in terms of a wrong, i. e. a breach of duty rather than of a right. Yet he does find a place for the term "a right." He says: "Every true right that is not mere negative freedom from a duty consists of a duty of another or of many others. . . . Austin's statement is apposite: . . . the term right and the term relative duty signify the same notion considered from different aspects. But Austin's theory contains no concept of right different from that of duty. Such a right exists when an individual is accorded by the legal order the opportunity to make the duty of another effective by bringing a suit and thus setting in motion the sanction provided for violation. Only in this case does the right of A to conduct on the

71. Kelsen, *Hauptprobleme der Staatsrechtslehre* (2 ed. 1923) 567-579; i. *Reine Rechtslehre* (1934) 40-46; id. *The Pure Theory of Law* (1934) 50 *Law Quart.Rev.* 474, 491-496; Voegelin, *Kelsen's Pure Theory of Law* (1927) 42 *Political Science Quart.* 268, 270-272. But this last essays to put Kelsen's doctrine in Hohfeldian terms.

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part of B fail to coincide with the duty of B toward A. Only in this case is the legal situation incompletely described by stating that B is under an obligation to A to act in a certain way. Hence the pure theory of law restricts" ⁷² the concept of a right to this situation. Only here is there a separately existing right in the narrow sense of the word. Thus a right is what we should call a power which one toward whom there is a duty may exercise in case of breach. One may query whether anything is gained by putting it in this way beyond avoiding the awkward terms *objektives* and *subjektives Recht*. Kelsen's doctrine follows from the threat theory of a law as Austin's does from his command theory. Indeed, he recognizes that in each case duty is made the primary conception.⁷³ As generally with Bentham,⁷⁴ to some extent with Austin, and markedly with Kelsen,⁷⁵ the discussion seems too much in terms of a penal code. Lundstedt also rejects the idea of a right. There are only "situations in which, on account of certain rules maintained by force, certain acts give rise to certain effects."⁷⁶ Here the threat theory is combined with a positivist theory of securing social functions. Do such theories supersede, for practical purposes, analysis of the juristic conceptions by means of which a politically organized society makes the threats effective?

4. *Analysis of a right in the wider sense.*⁷⁷ I should put the juristic conceptions by which legally rec-

72. Kelsen, *The Pure Theory of Law* (1941) 44, 61.

73. *Ibid.* 59.

74. *The Limits of Jurisprudence Defined* (1915) 33, 58. See review by Pound (1945) 23 *Texas Law Rev.* 411, 414, 416-417.

75. *The Pure Theory of Law* (1941) 55 *Harvard Law Rev.* 44, 58-59.

76. *Superstition or Rationality in Action for Peace* (1925) 117-119.

77. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923)—reprint of papers in 23 *Yale Law Journ.* 16, 30 (1913), and 26 *id.* 712 (1916); Kocourek, *Jural Relations* (1927) chaps. 1, 4, 6; Pound, *Fifty*

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ognized and delimited interests are secured as legal rights (in the stricter sense), powers, liberties, privileges, duties, and liabilities. There are conceptions of control (rights and powers), conceptions of non-restraint (liberties and privileges) and conceptions of subjection (duties and liabilities).

Perhaps the most notable achievement of analytical jurisprudence in the past fifty years is the analysis of "a right" and resolving what had gone by that name into a number of components. Austin at least suggested the setting off of "liberties" from "rights."⁷⁸ He points out that a "liberty" is the absence of legal restraint, a condition or situation of legal non-restraint of one's natural freedom of action, whereas a "right" is, as he puts it, a "faculty" residing in a determinate person by virtue of a given rule of law which avails against some other person and answers to a duty resting on that person.⁷⁹ He does not develop the distinction, but he evidently saw the difference between the so-called right to pursue a lawful calling or right of free contract and the right to free choice of location or right of corporal integrity. The Ger-

Years of Jurisprudence (1937) 50 *Harvard Law Rev.* 557, 571-576; Radin, *A Restatement of Hohfeld* (1938) 51 *Harvard Law Rev.* 1141, 1147-1153, 1156-1160, 1163-1164; Salmond, *Jurisprudence* (9 ed. by Parker, 1937) note 207, pp. 305-310; Stone, *The Province and Function of Law* (1946) 115-124; Paton, *Text-Book of Jurisprudence* (2 ed. 1951) §§ 60-63.

78. 1 *Jurisprudence* (5 ed. 1885) 274-275—but first in 2 *id.* (1 ed. 1861) 15-17.

79. 1 *Jurisprudence* (5 ed. 1885) 285 n.

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man Pandectists analyzed what they called the "content of a right." That is they set off various conceptions or "jural relations" involved in "a right" in the broader sense—in the legally recognized and delimited interest plus the complex of "faculties" or "capacities of influence" (i. e. rights in the stricter sense, powers, liberties and privileges) by which it is secured. Thus Windscheid in 1862 differentiated (under *subjektives Recht*) a right from a power.⁸⁰ Thon in 1878 differentiated *Anspruch* (claim), *Genuss* (enjoyment, largely Austin's liberty) and *Befugung* (power).⁸¹ Bierling in 1883 made it *Anspruch* (claim)—that which one asserts in his complaint to a court of law—*Dürfen* (liberty), and *Können* (power).⁸² But these distinctions did not affect English analytical jurisprudence for some time. The terms "power" and "liberty" are not in the index to the thirteenth edition of Holland's *Jurisprudence* (1924)⁸³ and he uses privileges in the French sense to mean a pledge-right taking precedence irrespective of its date.⁸⁴ In his discussion of "ambiguous uses" of the term "right" he speaks of the language of continental Europe in which what is right, law, and a right are denoted by one word, and the English con-

80. 1 *Lehrbuch des Pandektenrechts* (1862) § 37.

81. *Rechtsnorm und subjektives Recht* (1878) chap. 5.

82. 2 *Kritik der juristischen Grundbegriffe* (1883) 49–73.

83. Instead he speaks of "rights of disposition" and "rights of enjoyment." *Elements of Jurisprudence* (13 ed. 1924) 210–211.

84. *Ibid.* 238.

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fusion of what is right with a right. But he conceives that "the simple meaning of the term 'a right' is for the purposes of the jurist entirely adequate."⁸⁵ At length in 1902 Salmond (following Jhering in setting off the secured interest, but calling the interest and the securing apparatus a right) adopted Bierling's distinctions but with an attempt at a system of correlatives which gave an unusual and forced meaning to "disability" (no power, i.e. the absence of any power) and "liability" (risk of exercise of a power). He distinguished legal advantages (rights in the wider sense), including rights in the stricter sense, liberties, powers, and immunities, from legal burdens including duties, disabilities, and liabilities.⁸⁶ In 1913, Hohfeld,⁸⁷ a pupil of Howison, one of the chief American expounders of Hegel, building on Salmond and thus indirectly on Bierling, constructed an elaborate scheme of opposites and correlatives after the manner of Hegelian logic. The defects of Hegel's logic, now well understood, are brought out in this ingenious and in many ways useful scheme.⁸⁸ Croce has pointed out that Hegel's

85. Ibid. 84. Unchanged from 6 ed. (1886) 69-70.

86. Jurisprudence (1 ed. 1902) §§ 70-74.

87. Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 Yale Law Journ. 16, 30, reprinted in Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays (1923).

88.					
Jural opposites:	{ right	privilege	power	immunity	
	{ no-right;	duty;	disability;	liability.	
Jural correlatives:	{ right	privilege	power	immunity	
	{ duty;	no-right;	liability;	disability.	

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opposites are often not opposites but only contrasts.⁸⁹ This is true also of the "opposites" in Hohfeld's scheme, e.g., right and no right, power and disability. All we have here is a contrast of a right in the narrower sense with the absence of such a right and of a power with the absence of a power.⁹⁰

Moreover, Hohfeld's scheme presupposes that there can only be one opposite and one correlative and that there must be an opposite and a correlative.⁹¹ But there may be many contrasts and there are sometimes two correlatives. For example, correlative to one's legal right of exclusion as owner of Blackacre is his neighbor's duty not to trespass and his liability for trespass by his servant, trespass by his cow, and (in England) for breaking loose of his ponded water and flooding the land. If it is said that the liability in case of the servant is correlative to a power in the servant, it will hardly be maintained that we may go on and say that there was a legal power in the reservoir, and if it is sought to fit such situations into the scheme by speaking of a duty in each case, the result is that the neighbor would be said to be under a duty to prevent servant and cow and water from trespassing and a liability (in Hohfeld's sense) that

89. *What is Living and What is Dead in the Philosophy of Hegel* (transl. by Ainslie, 1915) chap. 4.

90. Radin has called attention to this and also to a logical difficulty in Hohfeld's use of "correlative." *L'analisi dei rapporti giuridici secondo il metodo di Hohfeld* (1927) 7 *Rivista internazionale di filosofia del diritto*, 117, 124.

91. In many talks with him and our long correspondence from 1909 till his illness, his invariable answer to what I had to say as to his forced scheme of opposites and correlatives was: "Professor Howison taught . . ." It was his firm belief that a juristic conception could only be understood by comparison with its opposite, that there was but one opposite, and that the opposite was a substantive entity.

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the servant make him liable in damages by exercising his power. But the legal situation is exactly the same whether it is servant or cow or water that gets out of hand.

Again, Hohfeld's scheme requires the finding of "opposites" (i. e. usually contrasts) and correlatives whether they have juristic significance or not. For example, "no right" is put as if there were such a juristic conception as "a no-right" parallel to a disability (in the usual sense, e. g. infancy or coverture at common law) or on the same plane as a legal right in the strict sense or a power.⁹² Simply there are situations in which one has no legal right in the narrower sense although he may have one in the wider sense. His not having a right in the narrower sense may be because the law does not recognize the interest asserted (e. g. in jurisdictions which do not recognize the "right to privacy") or because the law secures a recognized interest in some other way, e. g. by a liberty or a privilege or a power. Thus in Roman law a pact could be used defensively but not as the basis of an action. Here there is no legal duty in the promisor. But the promisee has a power of using his claim upon the promise defensively⁹³ and his recognized interest is secured to that extent and in that way. At common law the wife cannot sue the husband to enforce her recognized claim to support. But she can pledge his credit for necessities at the grocer's. Her recognized interest is secured by a power. Also at common law the parent cannot sue the child for disobedience. But he has a privilege of moderate correction to enforce obedience. If one who has a right in the wider sense has also a "no right" in Professor Goble's sense, it is because the interest is better or

92. Professor Goble, *Affirmative and Negative Legal Relations* (1922) 4 *Illinois Law Quart.* 94, speaks repeatedly of one having a no-right. E. g. at 100, 105. Also Cook speaks of "the one having 'the no-right'." Hohfeld's *Contributions to the Science of Law* (1919) 28 *Yale Law Journ.* 721, 725.

93. *Gaius*, 4, 116; *Dig.* 2, 14, 7, 4.

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sufficiently secured by a power or a privilege and so a right in the stricter sense is not conferred.⁹⁴

As to Hohfeld's "disability" (taken over from Salmond) this use of the term is unhappy because disability has a long settled meaning referring to such things as the disabilities of a married woman at common law, the disabilities of infants, and the like. It is unwise to lump these significant positive conceptions with the absence of powers in a person *sui juris* because no one has conferred powers upon him. Accordingly "inability" has been suggested instead.⁹⁵ But "inability" as the "opposite of power" is like no-right. It means merely no power, which is no more a juristic conception than no-right.

Not only does Hohfeld's scheme include pseudo-conceptions which are the absence of things put as things, but it excludes or ignores things which are of real significance. It ignores right in the broader sense, for which over and again we need a term. Often, for example, in the conflict of laws the recognized and delimited interest and the whole bundle of juristic conceptions securing it, as a totality, are significant. Also it ignores the legally recognized and delimited interest, which is often the most significant thing in the whole complex. Take, for instance, the natural obligation in Roman law. Here there is a recognized interest which has significance in itself.⁹⁶ Compare also the recognized claim of the husband as against the wife to her society, which has legal significance even if the action for restitution of conjugal rights is obsolete.

94. Professor Goble's contention that whenever a court decides that a plaintiff has not proved his case on the facts it decides he has a no-right (*Affirmative and Negative Legal Relations* (1923) 4 *Illinois Law Quart.* 94, 98 note 80) is an example of what the schematism of Hegelian logic may lead to.

95. Randall, Hohfeld on Jurisprudence (1925) 41 *Law Quart.Rev.* 86, 90.

96. Buckland, *Text-Book of Roman Law* (2 ed. 1932) 552-554.

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Finally, the exigencies of the scheme of triads require one category of "privileges" for the two kinds of condition of legal non-restraint of natural faculties. The one is the natural freedom of the individual—the *de facto* freedom of each of us to do as he likes—so far as it remains unrestricted by legal precepts. It is a general condition of non-restraint of natural powers. An owner's *ius utendi*, *ius fruendi*, and *ius abutendi* are of this sort. His natural powers or faculties of action are not restrained, and that is one way of securing his interest. The so-called "right of association" is of this type. The Austinian term "liberty", taken up by Salmond, does very well here. The other category is one of definite special conditions of non-restraint of natural powers on special occasions or in special situations. These are privileges in the stricter sense; situations in which on a weighing of the interests one is exempted from liability under the precepts which ordinarily apply to what he does.

Some improvements in Hohfeld's terminology have been suggested. One, to substitute "inability" for "disability," has been noted above. Another is to get rid of the awkward phrases "right in the wider sense" and "right in the narrower (or stricter) sense," by using "right" for the whole complex and "claim" (i.e. the German *Anspruch*) for the legal right with correlative duty.⁹⁷ Hohfeld's scheme of triads had no place for the whole complex and he sought to limit the term "right" to the narrower sense. It might also be suggested that "risk" would be better for the Hohfeldian "liability," which takes a well-known legal term with long settled meanings and puts it to a new use.

97. Kocourek, *Jural Relations* (1927) 7, 14.

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Later Kocourek, who in a number of papers had subjected Hohfeld's scheme to acute and discriminating criticism,⁹⁸ proceeding on the basis of Salmond's distinction between advantages and burdens, worked out a scheme of advantages (claim, immunity, privilege, power) and disadvantages (duty, disability, inability, liability) which brings out effectively the significant juristic conceptions (claim, duty, power, liberty, and privilege) without the incumbrance of opposites and correlatives.⁹⁹ He makes it clear that the contrasted ideas, useful to bring out these conceptions and define them clearly, are not for that reason themselves juristic conceptions or to be treated as such. But one cannot but feel that he carries out schematic exposition and terminology far beyond what is practically worth while. Thus the matter stands at present. One may feel that Occam's razor may well be applied to the hypertrophy of categories which analysis of "a right" produced for a time, and, in fact, current usage has pretty well settled down to caution in the use of the conventional terms and realization that the five or six significant conceptions must be clearly understood, what-

98. Kocourek, *The Hohfeld System of Fundamental Legal Concepts* (1920) 16 Ill.Law Rev. 24; *id.* *Various Definitions of Jural Relation* (1920) 20 Columbia Law Rev. 394; *id.* *Plurality of Advantage and Disadvantage in Jural Relations* (1920) 19 Mich.Law Rev. 47; *id.* *Tabulae Minores Jurisprudentiae* (1921) 30 Yale Law Journ. 215; *id.* *Polarized and Unpolarized Legal Relations* (1921) 9 Ky.Law Journ. 131; *id.* *Basic Jural Relations* (1923) 17 Ill.Law Rev. 515; *id.* *Non-Legal-Content Relations Recombated* (1923) 5 Ill.Law Quart. 150.

99. *Id.* *Jural Relations* (1927) chap. 13.

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ever they are called. Hohfeld did a great service to the law in bringing this home to teachers, practitioners, and judges. It was a misfortune that his untimely death prevented the further working over of the subject which would have taken place had he lived to put his work—which had hardly more than begun—in final form.¹⁰⁰ It may be useful to have a bibliography of the controversies as to the analysis of “a right” since Holland’s modification of Austin.¹⁰¹

100. In a short dictated letter to me at the time he left the hospital and was returning to California just before his death, he said that his first task was to rethink the whole subject and rewrite it.

101. Holland, *Elements of Jurisprudence* (1880) chaps. 7, 8, (13 ed. 82-93; Holmes, *The Common Law* (1881) 214; Bierling, *Zur Kritik der juristischen Grundbegriffe* (1883) 49-73; Hearn, *Theory of Legal Duties and Rights* (1883) chap. 8; Terry, *Some Leading Principles of Anglo-American Law* (1884) chap. 6; id. *Duties, Rights, and Wrongs* (1924) 10 A.B.A.J. 123; Merkel, *Juristische Enzyklopädie* (1885) §§ 146-170; Puntchart, *Die fundamentalen Rechtsverhältnisse des römischen Privatrechts* (1885) §§ 7-8; Schuppe, *Der Begriff des subjectiven Rechts* (1887) chap. 2; Salmond, *Jurisprudence* (1902) §§ 70-74, and Parker’s note in 9 ed. (1937); 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) §§ 44-46; Gray, *The Nature and Sources of the Law* (1909) §§ 22-62 (2 ed. 1921) 7-26; Wigmore, *A Summary of the Principles of Tort*, App. A, §§ 4-8, in 2 *Select Cases on the Law of Torts* (1912); Pound, *Introduction to the Study of Law* (1912) § 6; id. *Readings on the History and System of the Common Law* (2 ed. 1913) chap. 8 (3 ed. 1927); id. *Legal Rights* (1915) 26 *International J. of Ethics*, 92; id. *Fifty Years of Jurisprudence* (1937) 50 *Harv.L.Rev.* 556, 571-577; Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 *Yale Law Journ.* 16, reprinted in *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (ed. by Cook, 1923); 1 Beale, *Conflict of Laws* (1935) 58-86 (but first published in 1916); Cook, *The Alienability of Choses in Action* (1916) 29 *Harvard Law Rev.* 816 (1917) 30 id. 449; id. *Privileges of Labor Unions in the Struggle for Life* (1918) 27 *Yale Law Journ.* 779; id. *Hohfeld’s Contribution to the Science of Law* (1919) 28 id. 721; Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 id. 169; id. *Legal Analysis and Terminology* (1919) 29 id. 163; id. *Jural Relations and*

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§ 119. CLASSIFICATION OF RIGHTS.¹⁰² There are three elements of a legal right (in the narrower

Their Classification (1921) 30 *id.* 226; Terminology and Classification in Fundamental Jural Relations (1921) 4 *Am.Law School Rev.* 607; *id.* What is a Legal Relation (1922) 5 *Ill. Law Quart.* 50; *id.* Rights and Duties (1924) 33 *Yale Law Journ.* 501; Kocourek, The Hohfeld System of Fundamental Legal Concepts (1920) 15 *Ill.Law Rev.* 24; *id.* Various Definitions of Jural Relation (1920) 20 *Columbia Law Rev.* 394; *id.* Plurality of Advantage and Disadvantage in Jural Relations (1920) 19 *Mich.Law Rev.* 47; *id.* *Tabulae Minores Jurisprudentiae* (1921) 30 *Yale Law Journ.* 215; *id.* Polarized and Unpolarized Legal Relations (1921) 9 *Ky.Law Journ.* 131; *id.* Basic Jural Relations (1923) 17 *Ill.Law Rev.* 515; *id.* Non-Legal-Content Relations Recombated (1923) 5 *Ill.Law Quart.* 150; *id.* Jural Relations (1927); Goadby, Introduction to Law (3 ed. 1921) 58, 250—the 1st ed. (1910) and 2d ed. (1914) suggest no analysis; Page, Terminology and Classification in Fundamental Jural Relations (1921) 4 *Am.Law School Rev.* 616; Clark, Relations, Legal and Otherwise (1922) 5 *Ill.Law Quart.* 26; Goble, Affirmative and Negative Legal Relations (1922) 4 *id.* 94; *id.* Negative Legal Relations Re-examined (1922) 5 *id.* 36; *id.* A Re-definition of Basic Legal Terms (1935) 35 *Columbia Law Rev.* 535; Green, The Relativity of Legal Relations (1923) 5 *Ill.Law Quart.* 187; Vinogradoff, The Foundations of a Theory of Rights (1924) 10 *Va.Law Reg. N.S.* 549; Husik, Hohfeld's Jurisprudence (1924) 72 *Univ. of Pa.Law Rev.* 263; Brown, Re-Analysis of a Theory of Rights (1925) 34 *Yale Law Journ.* 765; Randall, Hohfeld on Jurisprudence (1925) 41 *Law Quart.Rev.* 86; Radin, *L'analisi dei rapporti giuridici secondo il metodo di Hohfeld* (1927) 7 *Rivista internazionale di filosofia del diritto*, 117; *id.* A Restatement of Hohfeld (1938) 51 *Harvard Law Rev.* 1141; Keeton, *Elementary Principles of Jurisprudence* (1930) pt. 2, §§ 15-16; Allen, *Legal Duties and Other Essays in Jurisprudence* (1931) 156-220—also in 40 *Yale Law Journ.* 33; Jenks, *The New Jurisprudence* (1933) chap. 8; Paton, *A Text-Book of Jurisprudence* (1946) §§ 55-56 (2 ed. 1951) §§ 60-61; Stone, *The Province and Function of Law* (1946) 115-124; Keeton, *Elementary Principles of Jurisprudence* (2 ed. 1949) chap. 11.

102. 1 Austin, *Jurisprudence* (5 ed. 1885) lects. 14-16; Holland, *Elements of Jurisprudence* (13 ed. 1924) 145-147; Salmond, *Jurisprudence* (9 ed. 1937) §§ 78-85; Markby, *Elements of Law* (6 ed. 1905) §§ 161-180; Terry, *Leading Principles of Anglo-American Law* (1884) §§ 128-138; *id.* Arrangement of the Law (1920) 15 *Ill.Law Rev.* 61, 73-74; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 64-114; Kocourek, *Rights in Rem* (1920) 68 *Univ. of Pa.Law Rev.* 322; *id.* *Jural Relations* (1927) chap. 13; Radin, *A Restatement of Hohfeld* (1938) 51 *Harvard Law Rev.* 1141, 1153-1156; Paton, *A Text-Book of Jurisprudence* (2 ed. 1951) § 63; Stone, *The*

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sense): person, object, and fact. The person element has two sides: a person entitled, in whom the capacity of influencing the action of others or of another, resides or inheres, the person on whom the legal order confers the right, and a person obliged, the person or persons on whom the corresponding duty is imposed, on whom, therefore, the capacity of influence through the force of a politically organized society operates. The object element (not always present) is spoken of commonly by jurists by the term "thing" or by the Latin word *res*. It is the material or corporeal, or the immaterial or incorporeal object with respect to which the right is conferred or is exercised. The fact element is the act or forbearance, that is, act of commission or act of omission (exertion of the will manifested outwardly) or event (operation of external nature independent of human will) which determines the scope of the right or gives rise to it, or with respect to which it is conferred.

In respect of those against whom they may be asserted, rights are (1) of unlimited or indeterminate incidence, or (2) of limited or determinate incidence. That is, they may be assertable against everyone (against the whole world, as the phrase is)¹⁰³ or assertable against some particular person or persons only. The former are

Province and Function of Law (1946) 124-130; 3 Roguin, *La science juridique pure* (1923) §§ 920-1195.

103. *Gegen die ganze Welt*. First used by Hugo in 1790, see 4 *Lehrbuch eines civilistischen Cursus* (7 ed. 1826) 72.

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usually called rights *in rem*; the latter rights *in personam*. These terms are derived from the Roman action *in rem*, in which a title was asserted generally against everyone, and action *in personam* in which a claim was asserted against the particular respondent. Examples of the first are a right of excluding all others from a tract of land one owns, a right of possession of a chattel, one's right to the integrity of his physical person, and one's right to his reputation. Examples of the latter are the right of a creditor to exact payment of the sum of money due, the right of one who has performed some service for another at his request, without stipulation as to the reward, to a reasonable compensation, and the right of a beneficiary under a trust against the trustee to have the trust carried out in good faith.

Roman jurists classified actions, not rights. But the terms, rights *in rem*, and rights *in personam*, do no violence to Roman usage and are linguistically admissible. The terms *in rem* and *in personam* were used by the classical jurists not only in classifying actions but in distinguishing different types of stipulations, pacts, defences (exceptions), and edicts. Where they had a general operation they were said to be *in rem*. Where they had to do with the duties of a particular person they were said to be *in personam*.¹⁰⁴ The terms have long been used in the modern science of law.¹⁰⁵ But the canonists said instead *ius in re* and

104. 1 Vangerow, *Pandekten* (7 ed. 1863) § 113 n. (and in 1876 reprint pp. 169-170). Reference to the texts may be found in Holland, *Elements of Jurisprudence* (13 ed. 1924) 146-147.

105. 2 Glück, *Ausführliche Erläuterung der Pandecten* (1791) § 175b; 4 Hugo, *Lehrbuch eines civilistischen Cursus* (7 ed. 1826) 40-42; and very generally ever since.

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ius ad rem,¹⁰⁶ and those terms were used by civilians from the seventeenth century,¹⁰⁷ and are discussed by Austin¹⁰⁸ who prefers right *in rem* and right *in personam*. Today Continental jurists commonly say real rights and personal rights,¹⁰⁹ or real rights and rights of performance, or real rights and obligations,¹¹⁰ or absolute rights and relative rights.¹¹¹ But whatever names are used the same distinction is drawn. Contrast of "real rights" (*dingliches Recht*) with obligation results from the Roman idea of infringements of the right of physical integrity and the like as giving rise to a debtor-creditor relation, and so thinking of such rights in terms of a duty of paying a penalty of reparation.

Terry finds a difficulty in that corresponding to a right *in rem* there is sometimes a liability rather than a duty, as e. g. in case of failure to give notice of a defective condition of the premises to an invitee.¹¹² Here if we say there is a duty to give notice he asks to what right it is correlative, a right *in rem* to the integrity of one's physical person, or a right *in personam* to have notice of the defective condition of the place to which he is asked to come. This is not the only case in which attempt to treat negligence from the standpoint of duty rather than of liability gives rise to serious difficulty. There is a liability for subjecting another to an unreasonable risk of injury which as well a duty not to commit an act of aggression upon his phys-

106. Vangerow, *l. c.* 170, with citation of the texts.

107. 1 Huberus, *Praelectiones Iuris Civilis* (1700) 1, 12 (in 2 ed. 1707, p. 81); Hugo, *l. c.*

108. 2 Jurisprudence (5 ed. 1885) 959-961.

109. 1 Thibaut, *Versuch über einzelne Theile der Theorie des Rechts* (2 ed. 1817) 23-66.

110. Hugo, *l. c.*

111. 1 Windscheid, *Pandekten* (9 ed. 1900) § 41.

112. *Leading Principles of Anglo-American Law* (1884) § 134.

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ical person is correlative. The legal right is the same in each case. It is only if one insists that there can be but one correlative to a right that it becomes necessary to deal with such a case from the standpoint of duty. Teachers of the law of torts have had to give up trying to solve all cases of negligence on the basis of a duty of care.¹¹³

Salmond raises an objection¹¹⁴ which is answered by Hohfeld who lays down that there are as many rights *in rem* as there are persons of incidence of the duty.¹¹⁵ Hohfeld objects because the terms *in rem* and *in personam* are used in other connections, such as judicial proceedings *in rem* and *in personam*, judgments and decrees *in rem* and *in personam*, and enforcement *in rem* and *in personam*, and so on "the principle of linguistic contamination" lead to misuse and confusion.¹¹⁶ Accordingly, he proposes the terms "multital" and "paucital."¹¹⁷ As he points out, ownership instead of involving one right involves a number of separate and distinct rights, powers, and liberties, with a duty correlative to each right. Also one might add in the case of equitable ownership, say of a trust *res* for example, there is both an equitable right *in rem*, as in case of legal ownership, and a right *in personam* against the trustee to have the trust carried out in good faith. Here failure to distinguish the recognized and delimited interest of the owner from the legal rights (in the narrow sense) and liberties by which it is secured is behind the confusion rather than any ambiguities in the terms right *in rem* and right *in personam*. Also as to various uses of these

113. See further as to Terry's argument, Kocourek, *Jural Relations* (1927) 192-199.

114. *Jurisprudence* (1902) § 81.

115. *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 26 *Yale Law Journ.* 710, 740 ff.

116. *Fundamental Legal Conceptions* (1923) 68-70.

117. *Ibid.* 71.

21. Rights

terms in other connections beside classification of rights, there are some features of likeness that have led to use of the terms in different situations. But that need not lead to any ambiguity when they are applied to rights as they have been for nearly three hundred years.

Paton urges two difficulties.¹¹⁸ One is that logically "no clear line can be drawn between the limits of 'persons generally' and 'particular person or persons.'" Hence if one were to grant a right of way to everyone in the community except X, or give a license to everyone in the world except Y, what had been a right *in rem* would now become a right *in personam* against X or Y.¹¹⁹ But quære. As to the grant to everyone in the community except X (if there could be such a thing, for a dedication would certainly include X) perhaps by a separate deed to each man, woman and child, there would still remain the right as against persons from other communities and the type of right would remain even if exceptions to its incidence had been specially created.¹²⁰ Such a purely logical objection without significance in practice and applicable to every proposed set of terms or classification can hardly require us to give up a universally recognized practical distinction. Moreover, the terms multital and paucital are open to the same merely logical (for it is not a practical) objection. How many persons of incidence must there be to make the legal right no longer paucital but multital, or vice versa? A second objection is said to be that in case of a trust the division into rights *in rem* and rights *in personam* is not exhausted because if the beneficiary is equitable owner his right *in rem* can be cut off by a transfer to a bona fide purchaser and so there is a third class of rights. But under the recording acts

118. Paton, *A Text-Book of Jurisprudence* (2 ed. 1951) 232-236.

119. This point was made by Kocourek, *Jural Relations* (1927) 198-199.

120. Hohfeld makes this point, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 73 note 22.

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the legal title of an owner of land can be cut off by delivering a deed to a bona fide purchaser who records. In other words, there may be a power to cut off rights whether *in rem* or *in personam*. The legal owner has two rights, a *ius possidendi* and *ius excludendi* but if he holds under an unrecorded deed there is a power in the person from whom he takes to execute a deed by virtue of which if recorded his legal rights may come to an end. The equitable owner has equitable rights *in rem* and also an equitable right *in personam*. His equitable right *in rem* is no less a right *in rem* because it can be cut off by a power in the trustee than the legal right of an owner under an unrecorded deed is not a right *in rem* because it can be cut off under the recording acts. The supposed difficulty comes from the historical view that the beneficiary of a trust only has a right *in personam* against the trustee.

Stone subjects Hohfeld's analysis to careful logical scrutiny and adapts its main features using, however, the terms right *in rem* and right *in personam* with the addition in parentheses of multital and paucital respectively after each.¹²¹ As he points out there is as to the twofold classification no significant advance on Austin. The real source of difficulty is in including too much under the term "a right."

As to the terms used, whether we are to say *in rem* or to say multital, to say *in personam* or paucital, is no great matter. What Holland says is very pertinent. ". . . These terms [*in rem* and *in personam*] though not perfectly satisfactory, have obtained a currency which is of itself a recommendation, and, moreover, are perhaps as good as any substitute which can be suggested for them."¹²²

121. *The Province and Function of Law* (1946) 124-130.

122. *Elements of Jurisprudence* (13 ed. 1924) 146.

Chapter 22

Powers

§ 120. A Power.

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Chapter 22

Powers ¹

Section 120



POWER is a legally recognized or conferred capacity ² of creating, divesting, or altering rights, powers, and privileges and so of creating duties and liabilities. It has been called a capacity of altering the sphere of rights or jural relations of persons,³ using these terms to mean rights in the broader sense. The Pandectists put the typical legal power, the *ius disponendi* as one of the elements of a right of ownership,⁴ which today we consider involves a legal

1. Salmond, Jurisprudence (9 ed. 1937) § 76; Miller, The Date of Jurisprudence (1903) 63-70; Hohfeld, Fundamental Legal Conceptions (1923) 50-63; 1 Kohler, Lehrbuch des bürgerlichen Rechts (1915) § 48; Thon, Rechtsnorm und subjektives Recht (1878) chap. 7; Stone, Province and Function of Law (1946) 131-134.

2. Hohfeld objects to use of "capacity" in connection with powers, saying that the word should be reserved for other uses. Fundamental Legal Conceptions as Applied in Judicial Reasoning (1923) 51. But he had no scruples about use of "disability" in an unusual meaning when it had a different and long settled meaning in the law books. "Capacity" has been used in defining rights and powers since Holland, Elements of Jurisprudence (1 ed. 1880) 56. Hohfeld takes "capacity" to mean "a particular group of operative facts." Op. cit. 34-35, 51. But is it the group of the facts or a legal result of them? Cf. Salmond, Jurisprudence (1902) § 76; Keeton, Elementary Principles of Jurisprudence (1930) 103-104 (2 ed. 1949) 135-140.

3. Garels, Enzyklopädie und Methodologie der Rechtswissenschaft (1 ed. 1887) 61, (5 ed. 1920) 70.

4. Puchta, Pandekten (2 ed. 1884) § 145; Arndts, Pandekten (5 ed. 1865) §§ 130, 132; 1 Windscheid, Pandekten (1 ed. 1963) § 167 (9 ed. 1906) 856-860.

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right (stricter sense) of possessing and a legal right (stricter sense) of excluding others or of requiring forbearances by others, as well as a number of liberties. Austin adopted this view. He says: "Taken with its strict sense, it [property] denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of disposition—over a thing.⁵" Holland also speaks of the "orbit or content of the right of ownership" which he puts as "possession, enjoyment, and disposition," including in "the right of disposition" the "right of alteration or destruction, and also the right of alienation."⁶ It will be noted that his "right of disposition" like the *Befügung* as an element of the right in the theory of the Pandectists, includes both liberties and powers. In the meantime, Thon gave up the idea of "contents of a right"⁷ and argued that the power of disposing was independent of the right of the owner.⁸ Powers of transferring title to the property of another make this very clear. Later Bierling set off *Anspruch* (legal right in the narrower or stricter sense) and *Können* (legal power) as distinct from each other and from right in the broader sense (*Recht im subjektiven Sinne*).⁹

5. 2 Jurisprudence (2 ed. 1863) 477 (5 ed. 1885) 790.

6. Elements of Jurisprudence (1 ed. 1880) 123-124 (13 ed. 1924) 210-211.

7. Rechtsnorm und subjektives Recht (1878) 326-327.

8. Ibid. 333.

9. 2 Kritik der juristischen Grundbegriffe (1883) §§ 147-149.

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Terry set powers off under the name of facultative rights or faculties.¹⁰ Salmond looked on powers as a class of rights in the wider sense.¹¹ He pointed out that there was no term correlative to right in the wider sense and including all the burdens imposed by law, as right includes all the benefits which the law confers. Among these burdens he put disability, the absence of power.¹² Hohfeld instead of advantages and burdens, put jural relations, opposites, and correlatives, with disability the opposite of power and liability as its correlative.¹³ Kocourek divides rights in the wider sense into authorities and exemptions. Correlative to rights he puts "ligations," which may be responsibilities correlative to authorities, and "debilities" correlative to exemptions. Under authorities he puts claim (*Anspruch*, legal right in the narrower sense) and power. The correlative responsibilities are duty, correlative to claim, and liability, (risk of exercise) to power.¹⁴ I have already spoken of the unusual or strained meanings of such terms as disability and liability, which these logical schemes involve. What is significant is that if A has a capacity (power) of creating, or divesting, or altering some right or power or privi-

10. Some Leading Principles of Anglo-American Law (1884) 100-101.

11. Jurisprudence (1902) § 76.

12. Ibid. § 77.

13. Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 Yale L.J. 16, 30, 44-58.

14. Jural Relations (1927) 21-23.

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lege, and so of creating a duty or a liability of B, B is subjected to a risk that the power will be exercised and that a duty or liability will be imposed upon him. If a chattel has been abandoned, Hohfeld would say there is a multital power by virtue of which any of us who comes upon the chattel may become owner of it by taking possession with intent to become owner and there is a multital liability that all of us may be subjected to duties correlative to the *ius possidendi* and *ius excludendi* which the one exercising the power has obtained. But the risk that I may have imposed on me duties of respecting ownership acquired by someone taking possession of an abandoned chattel of which I have no knowledge, and about which I care nothing, in some place I never heard of, is not a significant jurial conception. It serves only to fill out the symmetrical scheme.

As to the classification of powers, Bierling distinguished one *anerkannt* from one *begründet*,¹⁵ that is, as recognized by law where conferred by a legal transaction, or as conferred directly by law. Hohfeld, as noted above, might have distinguished them as multital or paucital. Terry distinguishes "a power or legal ability to determine existing rights" (e.g. a power under the statute of uses or statute of wills) from a power of representation (e.g. the powers of an agent).¹⁶ Bierling's classification seems the most useful.

15. 2 Kritik der juristischen Grundbegriffe (1883) 55-57.

16. Some Leading Principles of Anglo-American Law (1884) 100-101.

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Of recognized powers the most important and most commonly met with are powers of representation.

Here the type is agency, a relation in which one, the principal, has given another, the agent, a power of binding the principal by what the agent does within the scope of the power created by the legal transaction of giving it. One may act by himself or through another who has a legal power of binding him or making him liable. In Roman law it was considered that one could be represented in act but not in will. That is, where one determined to do something, he could carry out his intention by directing someone to do it for him.¹⁷ But he could not confer on another a power of exercising his will for him and determining independently what he should do or be held for.¹⁸ The most that could be done was to acquire through some one under his power, if he chose to take advantage of the acquisition. If he did so, the law made him liable for the disadvantages, if any, in order to prevent unjust enrichment at another's expense. Or he could contract with another that the other should do something on his behalf and thus, without having acted himself, have a claim upon contract to the benefit of what was done and a liability to indemnify the one who acted from liability for doing it.¹⁹ The law of the church in the Middle Ages, on the other hand, considered that one was morally and so legally bound by the acts of those whom he authorized to represent him, and its maxim, *qui facit per alium, est perinde, ac si faciat per se ipsum*,²⁰ now commonly phrased as *qui facit per alium facit per se*, was taken over by the common law.²¹

17. Dig. 44, 7, 2, 2.

18. "The Romans have no term which expresses the idea of representation." 1 Dernburg, Pandekten (8 ed. 1911) § 117, n. 2.

19. See Buckland, Text-Book of Roman Law (2 ed. 1932) 533-534.

20. Sext. v, 12 (de regulis iuris) 72.

21. Anon. Fitzherbert's Abridgment, Annuities, pl. 51 (Com.Pl. 1304-1305).

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Although the act of the agent is spoken of legally as the act of the principal, the case is rather that the agent has been given a power of creating, altering, or divesting rights of his principal and of creating or altering duties and creating liabilities imposed upon the principal. The principal confers upon the agent and the law recognizes a power of binding the principal by acts within the scope of the agent's authority. This is recognized by law to secure the individual interest of the principal. Binding a principal by acts within the apparent authority of the agent, holding the principal for the torts of the agent, and holding the employer for torts of the employee, belong to the category of powers conferred by the law directly. They are to be referred to the social interest in the general security in the case of employer and employee, and to the social interest in the security of transactions in the case of apparent authority of an agent.²²

Assignment of a chose in action was long looked upon as creation of a power to represent the creditor, suing in his name and retaining the proceeds. In equity an assignment was considered to be in the nature of a declaration of a trust and an agreement that the assignee make use of the assignor's name in order to recover the debt. The person to whom assignment had been made "was regarded as attorney rather than as assignee."²³ Even after modern legislation had made claims of almost all descriptions assignable so as to pass legal title, there have been some cases where the idea of a *ius disponendi* is not held applicable to the transfer of rights. An example is transfer of a right of entry where an owner of land is disseised. Where this is not permitted, yet conveyance of the right is treated as creating an agency, a power to sue in the name of the disseised owner, but

22. As to agency for litigation, see Pound, *The Lawyer from Antiquity to Modern Times* (1953) 23-174; also *post*, § 145(2).

23. Butler's note, 2 Co.Lit. (18 ed. 1823) 232 b.

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with a power in the disseisee to revoke by conveyance to the dis-seisor, which was allowed at common law.²⁴

Power of a pledgee to sell pledged property where he has possession but not ownership is another example. At first it was not easy to understand how one could hold against one who had the legal title or convey what he did not own. Hence in Roman law pledge first took the form of conveying the pledged property to the pledgee with a contract on his part to reconvey it on payment of the debt secured.²⁵ When possession came to be secured by the interdicts, it was held that the pledgee could be put in possession with a power given by contract to sell the pledged thing in case of default. Later pledge carried with it a power of sale,²⁶ and such is the modern law.²⁷

Powers under the statute of uses, that is, capacities of calling legal estates into existence in the future,²⁸ powers of severance of fixtures under a contract of conditional sale,²⁹ and powers of creating contract rights by acceptance of offers³⁰ may also be mentioned.

Conferred powers, that is, powers conferred directly by law, not indirectly by giving legal effect to the acts of those intending to create them, are the more numerous. The type is the *ius disponendi*, once regarded as a neces-

24. *Dever v. Haggerty*, 169 N.Y. 481, 62 N.E. 586 (1902).

25. See Buckland, *Text-Book of Roman Law* (2 ed. 1932) 473-474.

26. *Ibid.* 476-477.

27. Story, *Bailments* (7 ed. 1863) §§ 308-310.

28. Farwell, *Powers* (1874) 3. Likewise under the Statute of Wills. *Ibid.* 6.

29. *Union Bank & Trust Co. v. Wolf* (1904) 114 Tenn. 255.

30. 1 Williston, *Contracts* (1936, rev. ed.) § 25.

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sary and still considered a normal incident of ownership, including not only complete transfer of title but creation of limited real rights³¹ and creation of privileges by legal transactions.³² Of much the same nature is the *ius adquirendi* or power of acquiring ownership (1) of ownerless things by occupation, (2) of property of others or limited real rights by prescription (adverse possession, adverse user), and (3) of the property of others by legal transactions.

As Terry thought of powers as "facultative rights," while he saw that there were no corresponding duties, he was troubled by the relation of duty to right in the case of powers of acquiring. As he put it, there were persons in a position to owe duties the moment that exercise of such a power created the rights of an owner. But these were indeterminate. On the other hand, in case of a power of transfer of another's property it is available against a specific person only. Hence Terry speaks of facultative rights *in rem* and facultative rights *in personam*.³³ To Hohfeld, difficulty arises from the necessity of a correlative and an opposite. These are easily found in case of Terry's facultative right *in personam* or what Hohfeld would call a paucital power. But, as to a *ius adquirendi*, who has the correlative "liability" or risk? Shall we say everyone, since all had a power (if not an opportunity) of acquiring the *res*, which is cut off when someone exercises his power? Who has the opposite "disability" or

31. *Post*, chap. 30, 10; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 2745.

32. *Post*, chap. 23, § 121, 3. The owner who confers the privilege does so by virtue of a power attached by law to his ownership, although he exercises the power by a legal transaction.

33. *Some Leading Principles of Anglo-American Law* (1884) 102-103.

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inability or no-power? In the case of so-called ownership of wild game *ratione soli*³⁴ everyone but the owner of the land on which the *res nullius* is for the time being? Compare the rule as to trespassers in case of lost or abandoned chattels.³⁵ Is there here a multital inability? Are we to say, then, that if the ownerless thing is not on private land or there is no claim *ratione soli* there is a multital power and a multital Hohfeldian liability, but no inability, in the face of the necessary requirement of an opposite? How as to treasure trove, as to which in the United States we seem to admit a *ius adquirendi* in trespassers.³⁶ Or is the *ius adquirendi* a liberty or in Hohfeld's scheme a privilege? But then it must have as an opposite, duty, and as a correlative, no-right. There is no multital duty not to interfere with the multital *ius adquirendi* of the hunter chasing game on wild land.³⁷ But in any case, duty must be the opposite not the correlative of privilege. The correlative must be no-right.³⁸ Is there a multital absence of right to acquire while someone else is trying to acquire; for after acquisition it is no longer a question of a liberty (privilege) but of a right? Clearly there is not. Such purely academic logical difficulties of speculative analytical jurisprudence need not trouble us in so practical a subject as the science of law. As to the *ius adquirendi* of ownerless things the significant point is not in opposites or correlatives but in the capacity of creating the rights of an owner.

Powers of creating or transferring title to or interests in the property of another may be referred to another type of conferred power.

34. 2 Blackstone, Commentaries (1766) 393. 394-395.

35. *Barker v. Bates*, 13 Pick. (Mass.) 255 (1832).

36. *Weeks v. Hackett*, 104 Me. 264, 71 A. 858, 19 L.R.A., N.S., 1201 (1908).

37. *Pierson v. Post*, 3 Caines (N.Y.) 175 (1805).

38. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (1923) 36.

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Here may be put sales by public officers or officers of courts under process, decrees of courts, or provisions of statutes, e. g. under execution or attachment, by judicial sale, or for non-payment of taxes or assessments. The title transferred may be either original (as in sales in admiralty and in prize, and in forfeiture proceedings under statutes as to revenue or excise or against narcotics or gambling) or derivative.³⁹ Also a landlord may have a power of selling chattels of the tenant or of a third person brought on the leased land by the tenant, taken in distress for rent in arrear.⁴⁰ But the power may be only to acquire a lien, i. e. a right of possession, as at common law by distress of cattle damage feasant.⁴¹ A wrongdoer may sometimes have a power of transferring title to what belongs to another. For example, sale of stolen goods in market overt,⁴² acquisition or sale by a disseisor of a chattel severed from the land,⁴³ sale by mortgagor of a chattel severed from the mortgaged land,⁴⁴ under the recording acts transfer by grantor in an unrecorded deed to a purchaser for value without notice who records his deed,⁴⁵ sale by a trustee, who has legal but not equitable ownership, to a purchaser for value without notice,⁴⁶ and power of cutting off equitable claims by sale to a bona fide pur-

39. *Griffith v. Fowler*, 18 Vt. 390 (1846).

40. 3 Blackstone, Commentaries (1767) 14.

41. *Ibid.* 13.

42. 2 *id.* (1766) 149.

43. *Brothers v. Hurdle*, 10 Ired.L. (N.C.) 490 (1849); *Branch v. Morrison*, 5 Jones L. (N.C.) 16 (1858); 6 *id.* 16 (1858); *Stockwell v. Phelps*, 34 N.Y. 363 (1866); *Page v. Fowler*, 28 Cal. 605 (1878); *Lehigh Zinc Co. v. New Jersey Zinc Co.*, 55 N.J.L. 350, 357, 26 A. 920 (1893); *Phelps v. Church of Our Lady, Help of Christians*, 99 F. 683, 695 (C.C.A.3d, 1900).

44. *Angier v. Agnew*, 98 Pa. 587 (1881).

45. See, e. g., *Earle v. Fiske*, 103 Mass. 491 (1870).

46. 2 Scott, Trusts (1939) § 284.

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chaser.⁴⁷ Other examples are: power of a carrier to sell perishable goods,⁴⁸ power of a tenant to subject the property of another to risk of distraint for rent in arrear,⁴⁹ power of a finder of perishable property to sell,⁵⁰ *fructus perceptio* and *fructus consumptio* in Roman law,⁵¹ transfer by a legatee or devisee under a probated will which is afterward annulled,⁵² power of a tenant without impeachment of waste to become owner of wood cut.⁵³

A distinction is to be made between the authority of an agent and his power. The authority is given by the principal and is recognized and made effective by the law in a power. But in order to maintain the security of transactions the power conferred by law may be broader than the authority.⁵⁴ As to third persons, it may extend

47. 1 Story, Equity Jurisprudence (13 ed. 1886) § 64 *a*.

48. *Pope v. Nickerson*, 3 Story (U.S.) 465, 491 (1844); *Rankin v. Memphis & C. P. Co.*, 56 Tenn. (9 Heisk.) 564, 568 (1872).

49. 3 Blackstone, Commentaries (1767) 8. Also power of a guest at an inn to subject the property of another to a lien by bringing it with him to the inn, *Cook v. Kane*, 13 Or. 482 (1886), and in England power of a thief or wrongdoer to subject another's property to a carrier's lien. *Exeter Carrier's Case* cited in *Yorke v. Greenough*, 2 Ld.Raym. 866, 867 (1703).

50. *Trustees of Mill Creek Tp. v. Brighton Stock Yards Co.*, 27 Ohio St. 435, 439 (1875).

51. Inst. 2, 1, 35-37; Dig. 7, 4, 13; 12, 1, 25, 1, 2.

52. *Thompson v. Samson*, 64 Cal. 330, 30 P. 980 (1883); *Foulke v. Zimmerman*, 14 Wall. (U.S.) 113, 20 L.Ed. 785 (1871).

53. *Baker v. Sebright*, 13 Ch.D. 179 (1879).

54. Seavey, *The Rationale of Agency* (1920) 29 Yale Law Journ. 858, 961; *id.* *Studies in Agency* (1949) 67-70.

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to the apparent scope of the authority, although as between principal and agent the broader power may be wrongfully exercised. In such cases the agent acts in exercise of his power although without authority.⁵⁵ This is well brought out in the liability of the employer for torts of the employee in the course and scope of the employment. The employer does not give the employee authority to bind him by doing wrongful acts. But the law, in order to maintain the general security, confers the power. Terry suggests that the legal theory of the liability of the principal or employer is based on "the notion that the agent or servant bears *pro hac vice* the personality of his principal or master, and the latter is responsible for the acts of the former because they are in contemplation of law his own acts." Accordingly, he speaks of a "transfer of *persona*."⁵⁶ But this mode of thinking is an *ex post facto* rationalizing of liabilities having their origin in archaic ideas of standing between an injured person and his vengeance upon a dependent who had done him wrong, ideas which have survived because of the social interest in the general security. The fiction of representation is not needed for these cases. Liabilities imposed to maintain the general security where there are injuries by animals, by things maintained or done upon

55. Ibid.; 1 American Law Institute, Restatement of the Law of Agency (1933) § 161; *Kidd v. Thomas A. Edison Inc.*, 239 F. 405 (D.C.N.Y.1917).

56. Leading Principles of Anglo-American Law (1884) §§ 35, 127.

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the land which get out of hand, or in the course of enterprises carried on, rest on the same basis and require no fiction of representation to support them.⁵⁷ Historically these liabilities go back to liability of the head of a kin-group in a kin-organized society. Analytically they should be referred to powers conferred by law or are direct liabilities to be compared with the absolute duties enforced by criminal law. Their justification is that they maintain the social interest in the security of transactions or the broader social interest in the general security.

Among other powers conferred directly by law is the power of a promisor to transform his duty to perform into a duty to pay damages.⁵⁸ But while the power exists, equity will not recognize it as rightfully exercisable and will decree specific performance where the remedy at law is inadequate.⁵⁹ Powers of rejection, e. g. where equity requires election in order to prevent unjust enrichment, may be instanced also.⁶⁰ In another type of powers conferred by law directly, not originating in a legal transaction, the interest secured is not social but is the individual interest of the holder of the power. Of this sort are powers

57. Holmes, Agency (1891) 4 Harvard Law Rev. 345, 5 id. (1891) 1; Wigmore, Responsibility for Tortious Acts: Its History (1893) 7 Harvard Law Rev. 315, 383; L. Hand, J. in *Kidd v. Thomas A. Edison Inc.*, 239 F. 405, 406-408 (D.C.N.Y.1917).

58. *Clark v. Marsiglia*, 1 Denio (N.Y.) 317 (1845).

59. See Bigelow's note, 2 Story, Equity Jurisprudence (13 ed. 1886) § 717 note a.

60. Swanston's note b to *Dillon v. Parker*, 1 Swanst. 359, 394-401, where, however, after the manner of the nineteenth century the doctrine is rested on the presumed or implied intention of the author of the instrument to which it is applied.

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of revocation, e. g. of offers,⁶¹ licenses,⁶² and gifts *causa mortis*,⁶³ and in the Roman and civil law powers of revocation of gifts *inter vivos* for ingratitude.⁶⁴ Here belong also powers of rescission for fraud, duress, or mistake.⁶⁵

61. *Dickinson v. Dodds*, 2 Ch.D. 463 (1876). Here there is a power of terminating another power.

62. *Wood v. Leadbitter*, 13 M. & W. 838 (1845). Here there is a power of terminating a privilege.

63. *Jones v. Selby*, Prec.Ch. 300 (1710); Dig. 34, 6, 16.

64. Cod. 8, 55, 10, pr.; French Civil Code, art. 953; German Civil Code, § 530.

65. 2 Story, *Equity Jurisprudence* (13 ed. 1886) § 694.

Chapter 23
**Conditions of Non-Restraint
of Natural Freedom ¹**

§ 121. Liberties, Privileges, and Immunities.

§ 122. Immunities of Labor Unions.

Chapter 23

Conditions of Non-Restraint of Natural Freedom¹

Section 121



LIBERTIES, PRIVILEGES, AND IMMUNITIES. 1. *Nature and distinctions.* Individual self-assertion whether thought of as an individual interest in freedom of will, or as a phase of the social interest in the individual life, is secured by conditions or occasions of what might be called legal hands off—conditions or occasions as to which no duties or liabilities are imposed. Austin² and Salmond³ call them liberties. But Austin's "liberty" is a compos-

1. 1 Austin, *Jurisprudence* (5 ed. 1885) 274-275, 356; Salmond, *Jurisprudence* (1 ed. 1902) § 75, (9 ed. 1937) 299-303; Miller, *The Data of Jurisprudence* (1903) 96-100, 103-108; Bigelow, *Elements of the Law of Torts* (8 ed. 1907) 13-16; Brown, *The Austinian Theory of Law* (1906) 180-181, note; 2 Bentham, *Works* (Bowring ed. 1843) 217-218; Hearn, *Theory of Legal Duties and Rights* (1883) 133-134; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 38-50; Bohlen, *Incomplete Privilege* (1926) 39 *Harvard Law Rev.* 307; Kocourek, *Jural Relations* (1927) 125-128; id. "Privilege" and "Immunity" as Used in the *Property Restatement* (1939) 1 *La. Law Rev.* 255; Thon, *Rechtsnorm und subjektives Recht* (1878) chap. 6; Somló, *Juristische Grundlehre* (1917) §§ 128-129.

2. 1 *Jurisprudence* (5 ed. 1885) 356.

3. "They are the various forms assumed by the interest which I have in doing as I please. They are the things I may do without being prevented by the law." Salmond, *Jurisprudence* (9 ed. 1937) § 75.

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ite conception. It includes (1) the natural liberty of men, their *de facto* freedom to do as they like, so far as it remains unrestricted by legal precepts. Here there is a general condition of legal non-restraint of natural freedom. (2) It is made to include, along with the foregoing, definite special conditions of non-restraint of individual action on special occasions. These last are what in the common law we have usually called privileges—situations in which on a weighing or valuing of interests one is exempted from liability under legal precepts which ordinarily apply to what he does. Examples are, privileged occasion in defamation, self-defense, reasonable correction of a child. In such cases it is the occasion that is privileged. Legal persons have legal rights and legal powers. Occasions are privileged. In the one case (liberty) a whole field of human activity is left legally untouched. It is negative, an absence of legal regulation, a legal hands off, as an effective way of securing an interest. In the other case (privilege) the field is regulated, but the regulation is not applied with respect to certain occasions. As a practical matter one cannot suppose a system of law without a large residue of *de facto* freedoms untouched by law. Nor does experience suggest any likelihood of legal provision for all cases and varieties of conduct so minute and exact as to require no exception of occasions. Whether or not liberty and privilege are necessary conceptions in Austin's sense, they are highly

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useful if not indispensable conceptions as society is organized and men are constituted today.⁴

It has been suggested that symmetry of the "table of jural relations" requires the putting of liberty and privilege in one category.⁵ Indeed, the exigencies of Hohfeld's system of triads not only require one category for the two but call also for a category of "immunities" with "liability" (risk) as its opposite and "disability" (no-power) as its correlative. These are necessary to fill out the table symmetrically. Perhaps we have here an example of the juristic aesthetics of which Radbruch speaks.⁶ "Immunities" will be considered below.⁷

In Hohfeld's scheme of fundamental legal conceptions, the holder of a power has (a) the power, and (b) a privilege of exercising it.⁸ It is often true that one who has a power is under no duty to exercise it. No one can through the law compel him to exercise it, nor even in some cases control his exercise of it. This is true of the owner's *ius disponendi*, of *fructus perceptio* in Roman law, and of the power of a disseisor to sever chattels from the land and convey title to them. In Hohfeld's system the op-

4. Pound, *Progress of the Law—Analytical Jurisprudence* (1927) 41 *Harvard Law Rev.* 174, 182-183, note 46.

5. Paton, *Jurisprudence* (1946) 214 (2 ed. 1951) 225.

6. *Rechtsphilosophie* (3 ed. 1932) § 14. See Pound, *Fifty Years of Jurisprudence* (1938) 51 *Harvard Law Rev.* 444, 458.

7. *Infra*, 4.

8. [Authority] "is used in two very different senses, e. g. the power held by the agent and the power coupled with the privilege of exercising it." Seavey, *The Rationale of Agency* (1920) 29 *Yale Law Journ.* 859, 860; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 52.

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posite of privilege is duty and the correlative is no-right. In these cases there is a privilege in his sense of the term. But in the case of some other powers there is a legal duty not to exercise them. Exercise of them is a wrong for which the holder of the power is answerable to some one on whom the liability or risk of their exercise is imposed by law, who, therefore, has a right which is infringed by exercising them. Such e. g. are the power of sale in market overt, the power of a trustee to sell in breach of trust and give title to a bona fide purchaser, and powers of conveyance to a purchaser for value without notice who first records under the Recording Acts. There are other cases where along with the power there is a duty of exercising it in good faith. The holder of the power may not be compellable to exercise it, but if he does is under a duty correlative to a right of some one to require full disclosure, fairness and good faith in the exercise. This is true e. g. of powers of fiduciaries. Or it may be that exercise of the power is compellable, i. e. there is a duty of exercising it as in cases where a power is held in trust.⁹ In other words, a holder of a power need be under no duty to exercise it or with respect to his exercise of it, or may be under a duty not to exercise it, although able to do so, or may be under duties with respect to how he shall exercise it, if he chooses to do so, or may be under a duty of exercising it toward persons for whose benefit it is held in trust. This is well brought out in agency. Suppose (1) the agent exercises a power within the authority. Here he has a duty toward the principal of exercising it in good faith. Also there may be a duty here to the principal of exercising it in a specific way according to specific instructions. But there may be no duty as to third persons, or, where the power is given in trust for third persons, there may be a duty as to them. Or (2) the agent may have authority but

9. *Hardinge v. Glyn*, 1 Atk. 469 (1739); *Richardson v. Chapman*, 7 Bro.Cas. Parl. 318 (1760); *Brown v. Higgs*, 8 Ves. 561, 570-571 (1803).

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be under no duty (a) as to the principal, or (b) to third persons, to exercise it. It may be, for example, that he has been given complete discretion as to a particular transaction or type of transactions. Suppose however (3) the agent acts beyond the authority but within its apparent extent. There is no duty to third persons here. No one has a right to require exercise of the power to its apparent extent. But there is a duty to the principal not to exercise it against or beyond the instructions of the principal, and the agent is liable to the principal for breach of the fiduciary duty.¹⁰

Are we to assume that the power of an agent is one and indivisible—that is, not distinguishable as (a) arising from a legal transaction recognized and given effect by law, and (b) conferred directly by law to maintain the security of transactions? If we may assume that it is so divisible, case (1) and case (2) are of type (a) while case (3) is of type (b). In cases (1) and (3) there are duties to the principal but none as to third parties. In case (2) there is no duty to any one. As to third parties except where the power is given in trust for specified third parties, there is no duty in any of the three cases. As to the principal, there is a duty in cases (1) and (3). The distinction between types (a) and (b) is significant from the standpoint of the interest secured. From the standpoint of the symmetrical table of opposites and correlatives the absence of duty is significant. The complete absence of duty in case (2) and its absence as to duty to third persons in cases (1) and (3), call for the conception of privilege as no duty. In case (2) the agent has a free choice whether to exercise the power. Is this liberty or privilege? The law, so far from keeping its hands off, will compel exercise in good faith if the power is exercised. Is the case, then, like one of a privilege created by a license? It is not one

10. American Law Institute, *Restatement of the Law of Agency* (1933) § 383e.

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of exemption from the ordinary rules as to the conduct and liabilities of an agent. The case is not like either liberty or privilege as juristic conceptions for securing interests. The free choice is like liberty but absence of duty requires saying "privilege" in Hohfeld's terminology. No duty is like no right and no power. A name may be held needed to fill out the symmetrical table. But the absence of right or duty or power may in itself mean nothing for any other purpose.

2. *Liberties.* Rights and powers are conceptions of control. They furnish a rational basis for understanding and applying legal precepts which secure recognized and delimited interests through abilities to control the behavior of others (legal rights) or by putting the backing of politically organized society behind creating, divesting, or altering such abilities to control (powers). Liberties and privileges are conceptions of non-restraint. They furnish a rational basis for understanding and applying legal precepts which secure recognized and delimited interests by leaving men unrestrained in exercise of their natural or *de facto* freedom, either over a whole field in which the law does not interfere (liberties) or on certain occasions as to particular acts which on those occasions are excepted from the operation of legal precepts which ordinarily apply to them (privileges). If it is useful to distinguish the two types of legal non-restraint of natural freedom, the term liberties, already used in that sense by Austin and Salmond, is to be preferred for the first. The term privilege has long been in use for the second.

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In the civilian analysis of ownership, *dominium* is said to include three liberties: The *ius utendi*, the *ius fruendi*, and the *ius abutendi*.¹¹ The *ius utendi* is an unrestricted freedom of use. Today the field of unrestricted use of property has been much narrowed.¹² But within the still wide field in which it still secures interests of substance and of freedom of the individual will there is a complete hands off. There is still an unrestricted freedom of beneficial use as to ordinary objects of ownership. *Ius fruendi*, freedom of taking and consuming the fruits or produce or, as is said at common law, the profits and avails may go with the *ius utendi* or may be separated from it. The *ius abutendi*, freedom to waste, or impair, or even to destroy the thing owned is recognized except as the mode of exercising the liberty may conflict with the social interest in the general morals (e.g. cruelty to animals) or with the social interest in the general security (e.g. destroying a building by blasting or by fire, so as to endanger the safety or property of others) or with the social interest in conservation of social resources (as in waste of a natural resource which is limited in quantity and capable of being put to wide public use).¹³ A testamentary provision for blocking up access to and precluding any

11. Hearn, *Theory of Legal Duties and Rights* (1883) 186.

12. *Anté*, § 35. For the older, broad view of this liberty see *Phelps v. Nowlen*, 72 N.Y. 39 (1878); *Letts v. Kessler*, 54 Ohio St. 73, 42 N.E. 765, 40 L.R.A. 177 (1896).

13. *Walls v. Midland Carbon Co.*, 254 U.S. 300, 41 S.Ct. 118, 65 L.Ed. 276 (1920).

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use of property for a term after the death of the owner has been held inoperative.¹⁴ But here there was an attempt to extend exercise of the *ius abutendi* beyond the ownership of which it was an incident. Appointment of receivers for agricultural land in case of threat of famine in time of war is an abrogation of this liberty as to such land.¹⁵

As far back as Magna Carta a number of claims which the individual makes to free exercise of his calling and freedom of self-assertion in the ordinary activities of life have been guaranteed against arbitrary infringements by the agencies of politically organized society. In America, these are declared in bills of rights or declarations of rights which in large part are bills or declarations of liberties. Two liberties especially insisted on in the United States in the last quarter of the nineteenth century were the so-called right to pursue a lawful calling (i.e. one naturally lawful, or, in other words, socially unobjectionable)¹⁶ and liberty of contract.¹⁷ The liberty of

14. *Brown v. Burdett*, 21 Ch.D. 667 (1882).

15. See *ante*, § 96.

16. *Field, J. in Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 756-757, 4 S.Ct. 652, 660, 28 L.Ed. 585 (1884); *Bradley, J.* 111 U.S. at pp. 762-763, 4 S.Ct. at pp. 656-657.

17. *Harlan, J. in Adair v. U. S.*, 208 U.S. 161, 171, 28 S.Ct. 277, 279, 52 L.Ed. 436 (1908); *Peckham, J. in Allgeyer v. Louisiana*, 165 U.S. 578, 592, 17 S.Ct. 427, 432, 41 L.Ed. 832 (1897); *O'Brien, J. in People ex rel. Rodgers v. Coler*, 166 N.Y. 1, 14-17, 59 N.E. 716, 720-721, 52 L.R.A. 814 (1901); *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 536-543, 90 N.W. 1098, 1100-1103, 58 L.R.A. 748 (1902); *Sutherland, J. in Adkins v. Children's Hospital*, 261 U.S. 525, 545-546, 43 S.Ct. 394, 396-397, 67 L.Ed. 785, 24 A.L.R. 1238 (1923).

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pursuing a lawful calling involved freedom of choosing the walk of life the individual elected to pursue, and freedom from arbitrary governmental interference with his pursuit of it. Constitutional guarantee of governmental hands off as to these claims was carried too far in the last century.¹⁸ Yet although the area of such liberties is today increasingly restricted, especially in case of public callings and industrial relations, the interests they secure are still recognized and must be taken into account over the whole field of the economic activities of ordinary individuals. A closely connected interest is secured by the so-called right of free association¹⁹ which may be called a liberty of association. That is, the interest in free association with one's fellows in organizations for purposes which the law regards as legitimate. It is noteworthy that those who go furthest in advocacy of this liberty are no less insistent on narrowing the field of non-restraint of natural abilities in case of free industry and free contract. In the last century the exigencies of the social interest in security of social institutions were felt to require narrowing the scope of free association. While free pursuit of lawful callings and free contract do not come into competition with that interest, today we are weighing them with respect to the social interest in the individual life. Neither the last century nor the present has

18. Pound, *Liberty of Contract* (1909) 18 Yale L.J. 454.

19. *Ante*, § 89.

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attained a satisfactory balance of the interests behind these different liberties.²⁰

3. *Privileges*. As has been said, in Hohfeld's scheme privilege is negation of legal duty and so liberties and privileges are put in one category. But looked at not as opposites but as positive conceptions for securing recognized interests (along with legal rights, powers, and liberties) privileges are exceptions of certain occasions and situations from the duties and liabilities ordinarily attaching to acts infringing the secured interests of others. These exceptions may be created by law directly or may be created by legal transactions and recognized by law.

Of these created by law directly, one type is permitted self help and self redress.²¹ The prototype here is the so-called right of self defense. On occasion of attack upon person or possession or immediately threatened attack, or reasonable belief in good faith that such an attack is being made or is imminent, forcible repelling of the attack or threatened or apprehended attack is permissible where otherwise there would be breach of duty or liability.²² It should be noted how carefully the privilege is limited both as to the occasion and as to exercise of it upon the occasion. The occasion is reasonably and in

20. *Ante*, § 86.

21. Fully as to this see *post*, chap. 33, 1.

22. 3 Blackstone, Commentaries (1767) 3-4.

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good faith apprehended immediate danger to life or limb. The exercise may extend only to what is, or reasonably and in good faith is believed to be, necessary to avert the threatened danger. Other privileges of self redress are recaption of chattels, distress for rent, distress of cattle damage feasant, and abatement of nuisances.²³ What seems to be behind them is an idea of necessity; occasions in which the help of the magistrate cannot be had in a reasonable time and there is danger that without immediate action the legal right giving effect to a recognized and secured interest will be defeated or greatly impaired.²⁴ Exercise of these privileges is limited to what is necessary and must be done without breach of the peace. The civilians distinguished self defense from self redress, the one being maintenance of an existing state of facts by one's own strength against attack by another, the other being establishment by one's own strength of a condition corresponding to one's legal right. As a rule, self defense was held lawful, but self redress unlawful except in case of necessity, where the help of the state could not be had in time to prevent irreparable injury.²⁵

Much like the foregoing are emergency privileges, where what would otherwise be trespasses are privileged on the ground of necessity. A typical case is where one

23. Ibid. 4-7, 15.

24. 1 Dernburg, Pandekten (8 ed. 1911) § 112. See German Civil Code, § 229.

25. Ibid.

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who is chased by a lunatic with a hatchet runs across another's land in order to escape. Trespasses may be excused also where there is necessity of protecting property from destruction or serious injury.²⁶ The necessity must be judged by the reasonable appearance at the time of the trespass.²⁷ But there is no privilege to preserve one's property at the expense of the property of another which is not menacing it.²⁸ The privilege of going *extra viam* over adjoining land where a highway becomes obstructed and impassable has also been referred to necessity and so has been said to be one not to be exercised merely for convenience. It has been said to be "confined to those cases of inevitable necessity or unavoidable accident arising from sudden and recent causes, which have occasioned temporary and impassable obstructions in the highway."²⁹ Lord Mansfield, however, in a much quoted case, put it on a broader ground: "Highways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be able to pass in another line."³⁰ Thus

26. *Proctor v. Adams*, 113 Mass. 376 (1873); *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188, 20 L.R.A.,N.S., 152 (1908); *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221, 27 L.R.A.,N.S., 312 (1910).

27. *Cope v. Sharpe*, [1912] 1 K.B. 496.

28. *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221, 27 L.R.A.,N.S., 312 (1910); *Swan-Finch Oil Corp. v. Warner Quinlan Co.*, 11 N.J.Misc. 469, 167 A. 211 (1933). The point is well made in the latter case although the case is decided on a different ground on appeal, 112 N.J.L. 519, 71 A. 800 (1934). See Bohlen, *Studies in the Law of Torts* (1926) 614.

29. *Campbell v. Race*, 7 Cush. (Mass.) 408 (1852).

30. *Taylor v. Whitehead*, 2 Doug. 745, 749 (1781).

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the privilege is referred to a social interest in the effective use of highways as instruments of economic activity. Roman law had a like provision.³¹ The civilians generalize all or most of these privileges from a procedural standpoint as defenses of necessity.³²

Another type includes privileged interferences to maintain the general security, such as prevention of felony,³³ arrest by private persons for felony or affray or breach of peace in their presence,³⁴ trespass in prevention of or defense against public peril such as fire, flood, or disease,³⁵ and defense against the public enemy.³⁶ Interference with economically advantageous relations in

31. Twelve Tables, vii, 7, Bruns, *Fontes Iuris Romani Antiqui* (7 ed. 1909)
27. See as to this Puchta, *Civilistische Abhandlungen* (1823) 99-101.

32. Moriaud, *Du délit nécessaire et de l'état de nécessité* (1889); De Hoon, *De l'état de nécessité en droit pénal et civil* (1920) 6 *Revue de droit Belge*, 29, 79; Titze, *Notstandsrechte* (1897); Oetker, *Ueber Notwehr und Notstand* (1903); 1 Neubecker, *Zwang und Vorstand in rechtsvergleichender Darstellung* (1910) 1-14, 107-133; Goldschmidt, *Der Notstand, ein Schuldproblem* (1913); Wolter, *Das Notrecht* (1928) 22 *Archiv für Rechts- und Wirtschaftsphilosophie*, 66-83.

As to duress as a defense to trespass at common law, see *Smith v. Stone, Style*, 65 (1648)—a case of *vis absoluta*, so no act; *Gilbert v. Stone, Aley*, 35 (1703, s.c. *Style*, 72)—a case of *vis compulsiva*, held no defense; *Cunningham v. Pitzer*, 2 W.Va. 264 (1867)—a case of forcible impressment into service by the Confederate army during the Civil War; held a defense.

33. 4 Blackstone, *Commentaries* (1769); *Handcock v. Baker*, 2 B. & P. 260 (1800).

34. *Samuel v. Payne*, 1 Doug. 359 (1780).

35. *Harrison v. Wisdom*, 7 Heisk. (Tenn.) 99, 113-117 (1872). The proposition is argued here as a liberty. But I submit that the exemption from liability attaches to particular occasions and is not a general legal hands off.

36. *Case of the King's Prerogative in Saltpetre*, 12 Co. 12 (1607).

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the course of competition or of permissible free self-assertion ³⁷ seems to me to come rather under the head of a liberty.

Still another type includes privileges as to speech and writing. Here we might begin with a jural postulate that in civilized society men must be able to assume that others will commit no intentional aggressions upon them and a corollary that one who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can establish a liberty or privilege by identifying his claim to act as he did with some recognized social interest. From this standpoint we are called on to refer each legal privilege ultimately to some social interest. Of those set forth above most are referable to the social interest in the general security, but some to the social interest in the individual life. Of the privileges as to speech and writing some are referable to the social interest in the security of social institutions, some to the social interest in political progress as a phase of the general progress and some to the social interest in the general morals as securing a general ethical custom of responding in good faith to requests for confidential communication of facts which the one to whom communication is made has a recognized claim to be informed. In some measure all these are reinforced by a claim referable

37. *White v. Mellin*, [1895] A.C. 154; *Beardsley v. Kilmer*, 236 N.Y. 80, 140 N.E. 203, 27 A.L.R. 1411 (1923).

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to the social interest in the individual life as involving free self-assertion in speaking and writing.

Absolute privilege of speaking and writing in legislative assemblies,³⁸ in legal proceedings,³⁹ and in administrative reports and proceedings,⁴⁰ are referable to a public interest in the effective functioning of political institutions, to be subsumed ultimately under the social interest in the security of social institutions. Privilege of truthful and fair reports of public proceedings⁴¹ are referable to the same interest. Privileges of comment on and criticism of public affairs, public officers, and candidates⁴² are referable to the social interest in the general progress and especially to a social interest in political progress as a phase of that interest, as well as to a public

38. *Cochran v. Couzens*, 59 App.D.C. 374, 42 F.2d 783 (1930).

39. *Scott v. Stansfield*, L.R. 3 Ex. 220 (1866); *Karlelas v. Baldwin*, 237 App.Div. 265, 261 N.Y.S. 518 (1932); *Seaman v. Netherclift*, 2 C.P.Div. 53 (1876); *Munster v. Lamb*, 11 Q.B.D. 588 (1883).

40. Veeder, *Absolute Immunity in Defamation, Legislative and Executive Proceedings* (1910) 10 Columbia Law Rev. 130. As to litigants, counsel, and witnesses, the English courts hold there is absolute privilege without regard to the relevancy of the language used. American courts, on the other hand, hold that to be absolutely privileged the words used must be relevant to the subject of inquiry. *Adams v. Alabama Lime & Stone Corp.*, 225 Ala. 174, 142 So. 424 (1932). The greater control of a trial and of counsel by the bench in England, as compared with the United States may explain the difference in adjustment of the conflicting interests.

41. *Ryalls v. Leader*, L.R. 1 Exch. 296 (1866); *Wason v. Walker*, L.R. 4 Q.B. 73 (1868); *Barrows v. Bell*, 7 Gray (Mass.) 301 (1856).

42. See Veeder, *Freedom of Public Discussion* (1910) 23 Harv.L.Rev. 413; *Smith, Are Charges Against the Moral Character of a Candidate for Any Elective Office Conditionally Privileged* (1919) 18 Mich.L.Rev. 1.

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interest in the effective functioning of political institutions.

Private communications in good faith made confidentially upon request to those who have an interest in receiving them are considered to be in response to a certain moral duty under the custom of mankind and so have qualified privilege.⁴³ The basis of the privilege here is brought out in the case of communication by a mercantile agency. The English courts, referring the matter to the social interest in the general morals, hold that a mercantile agency conducted for profit is not responding to any moral duty when it furnishes information to a subscriber and so deny a privilege.⁴⁴ American courts, considering the mercantile agency an important economic institution, reach a contrary result.⁴⁵

A few other privileges conferred by law directly may be noted briefly. Public prosecutors and executive officials acting within the scope of their authority are privileged absolutely as to prosecutions they institute or instigate. This is held essential to "fearless performance of official duty."⁴⁶ It is referable to the public interest in

43. *Coxhead v. Richards*, 2 Com.Bench, 569 (1846).

44. *Macintosh v. Dun*, [1908] A.C. 390.

45. *King v. Patterson*, 49 N.J.L. 417, 431, 9 A. 705 (1887); *Sunderlin v. Bradstreet Co.*, 46 N.Y. 188, 192 (1871); *Bradstreet Co. v. Gill*, 72 Tex. 115, 119, 9 S.W. 753, 756, 2 L.R.A. 405 (1888).

46. *Cooper v. O'Connor*, 69 App.D.C. 100, 99 F.2d 135, 118 A.L.R. 1440 (1938).

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efficient functioning of the political organization. Also referable to this interest is the privilege as to communications to the government by informers.⁴⁷ The privilege against self crimination, which exempts from the duty of testifying, is referable to the social interest in the individual life.⁴⁸ The policies behind the common-law privilege as to confidential communications by a client to his professional legal advisor and the statutory privilege in many of the United States as to communications between physician and patient are fully discussed by Wigmore.⁴⁹ As to confidential communications between husband and wife, the privilege is referable to the social interest in the security of domestic institutions.⁵⁰

Of privileges created by legal transactions and recognized by law the type is a license, a revocable personal privilege to do some act or series of acts which otherwise would be torts, especially to do them upon the land of another without having any estate or interest in the land. It is an excuse for what otherwise would be torts or trespasses, but has its origin in the legal transaction of giving it and gets its effect from legal recognition of that transaction. Does the tenant without impeachment of

47. *Worthington v. Scribner*, 109 Mass. 487-488 (1872). It extends only to the identity of the informant.

48. See the excellent discussion of the history and policy of this privilege in 8 Wigmore, *Evidence* (3 ed. 1940) §§ 2250-2251.

49. *Ibid.* §§ 2294-2295, 2380-2380a.

50. As to the policy of this privilege see *ibid.* § 2332.

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waste have a privilege created by the legal transaction of a conveyance or devise or has he rather a liberty—the *ius utendi* of an owner in fee? Equity will restrain any exercise by him of a *ius abutendi* to the extent of destroying or despoiling the inheritance.⁵¹ It seems, therefore, that one who holds without impeachment of waste has an excuse for what would otherwise make him liable for legal waste.

4. *Immunities.* It remains to consider certain legal situations in which a particular person or special groups or classes of persons are relieved by law from duties or liabilities appointed by law for their fellowmen. Hohfeld puts as jural opposites immunity and liability and *vice versa*, and as jural correlatives immunity and disability and *vice versa*; if there is immunity there is no liability on the part of the person who is immune, and if there is immunity there is also disability, i.e. no power of creating, altering, or divesting rights, or, must we not add, no capacity of holding the immune person or persons in a legal proceeding. He tells us that one has an immunity where he is not subject to having a legal relation controlled by another.⁵² He tells us also that a power is contrasted with an immunity as a right is with a privilege. Hence an immunity is freedom from risk of having a duty cre-

51. *Vane v. Lord Barnard*, 2 Vern. 738 (1716); *Stevens v. Rose*, 69 Mich. 259 (1888).

52. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 61.

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ated. He and his editor, Professor Cook, give as examples immunity from taxation, restrictions on the power of creditors or injured parties to exact satisfaction looking at them from the standpoint of the one whose interest is secured by imposing the restriction, e.g. homestead exemptions, common-law exemptions from distress, exemptions from execution, and spendthrift trusts.⁵³ Stone points out that the term is in use and in Hohfeld's sense is apt for the jurisdictional immunities of foreign sovereigns and ambassadors where essentially there is "not freedom from duties but freedom from liability of having duties imposed by the judicial organs of the state."⁵⁴ But are these like the cases of exemption of the homestead or of certain chattels from distress or levy of execution, or like the situation of the beneficiary of a spendthrift trust which Cook cites as examples of immunities? They are not conditions of non-restraint of natural faculties like liberties and privileges but are conditions of restraint as to remedies on one side and of exception from general rules as to risk or liability on the other side. In this respect they are not unlike privileges. But in a privilege the significant feature is non-restraint of the person acting whereas in Cook's examples of immunity it is restraint of the creditor who is acting.

In the examples which have been given by Hohfeld, his editor, and his expounders, three categories of legal

53. Cook's Introduction, *ibid.* 9.

54. Stone, *The Province and Function of Law* (1946) 123-124.

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situation have been drawn upon, none of which as commonly understood is made up wholly of Hohfeldian immunities, nor is any one of the categories framed to Hohfeld's scheme, although the third most nearly conforms to it. They are: the *beneficium* of Roman law and the civil law, exemptions in the common law and modern legislation, and immunities such as sovereign and diplomatic immunities. It will be convenient to look at each of them in detail.

As to *beneficia* in Roman law, in the *beneficium abstinendi*⁵⁵ the heir by abstaining from entering upon the inheritance had a power of relieving himself from the liability of a universal successor to answer for debts of the inheritance when they exceeded the assets. In Justinian's law and in the modern Roman law by virtue of the *beneficium inuentarii*⁵⁶ the heir by filing an inventory could limit his liability to the assets in the inventory. In these cases the heir had a power by the exercise of which he could escape liability or limit the power of the creditor to obtain satisfaction. In Hohfeld's terminology he had a power to acquire an immunity. By the *beneficium diuisionis* one of a number of sureties was not to be sued for more than the debt divided by the number of sureties solvent when the action was brought.⁵⁷ Where

55. See Buckland, *Text-Book of Roman Law* (2 ed. 1932) 451.

56. *Ibid.* 552-554.

57. *Gaius*, 2, 158; *Inst.* 2, 12, 2.

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there were co-heirs and one was insolvent, by virtue of the *beneficium separationis* the praetor might prevent confusion of the estates of the heirs, liable under the Twelve Tables each for his share of the debts, from injuring the creditors.⁵⁸ By the *beneficium cedendarum actionum* a surety before payment or issue joined could require the creditor to transfer to him all his rights and securities against the debtor or other sureties.⁵⁹ Obviously these *beneficia* are not all of one kind. In some, although the law did not put a restraint directly on the creditor, it gave the heir or debtor a power of doing so, so that when the power was exercised the power of the creditor to obtain satisfaction was restrained. In others, the law directly put restraint upon the power of the creditor. In the *beneficium separationis* the creditor could impose a limitation on the heirs by separation of estates. In the *beneficium cedendarum actionum* the surety could compel assignment to him of securities held against the debtor. The two last are ordinary legal powers. Others are powers of imposing restraint upon creditors. The *beneficium diuisionis* is like the *beneficium competentiae*⁶⁰ and *beneficium excussionis*⁶¹ a limitation upon the power of the creditor to obtain satisfaction.

58. Cod. 6, 30, 22, 5.

59. Dig. 46, 1, 51, 4.

60. Dig. 42, 6, 4, pr.

61. Dig. 46, 1, 17; 46, 3, 76.

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As to exemptions,⁶² where they are treated according to Hohfeld's scheme liability (i. e. risk) is put as the opposite and disability (no power) as its correlative. That is, if one does not have this so-called immunity, as where a homestead or household goods are exempt from execution, there is a risk that certain property may be taken in execution just as in case of the *beneficium excussionis* there is a risk that he may be sued on default of the principal debtor. If he has it, the creditor is unable to satisfy his claim out of certain property or to sue for the debt without proceeding against the principal debtor. If the creditor levies on exempt property the actionable wrong is infringement of the owner's *jus possidendi* or *jus excludendi*. If where the *beneficium excussionis* applies, he sues the surety without first proceeding against the principal, the remedy is a dilatory plea. But there is no profit in laboring this. In order to make a complete scheme of opposites and correlatives, no-risk (immunity) is contrasted with liability (risk), and disability (no power) is the correlative. What has been said of no-right and no-power applies equally to no-risk. These puttings of the absence of a right or of a power or of a risk as positive juristic conceptions are not required to classify or define juristic conceptions which actually obtain. Rather they are to make a complete logical, symmetrical table without regard to what are used or usable. Analytical system should be made to grow out of the law instead of trying to fit the law as it develops into logical compartments of a predetermined analytical system.

Immunities from suit are another matter. Immunity of this sort is not a fundamental legal conception. But certain particular special immunities of particular persons or classes of persons have existed in particular bodies of law or even at one time in legal systems general-

62. See *ante*, § 35, 4.

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ly. However they have disappeared with social and political progress. Very little is left of them today and with one important exception they are moribund.

Immunities may be classified as sovereign, official, pertaining to rank or profession, charitable, or domestic. Sovereign immunities are an institution of international law.⁶³ An international legal order, in the absence of an omnicompetent super-state, must postulate independence of each sovereign state from coercion by the legal agencies of other states. But in the legal order of each state sovereign immunities secure a public interest in the dignity of the political organization of society. These immunities so far as they relieve the local political organization from suit in its own courts to enforce its obligations and make reparation for wrongs done by its agents and servants have been disappearing with the rise of the social service state.⁶⁴ Official immunities historically are closely related to sovereign immunities. In the era of personal rulers the king's servants (note that minister literally means servant) shared in the reflected glory of the king. Hence high executive and administrative officials could make a claim to have their dignity maintained. But there is a better reason behind official immunities, namely, insuring thorough and efficient despatch of public business of every sort, not im-

63. 1 Oppenheim, *International Law* (8 ed. 1955) §§ 112-128.

64. See *ante*, § 42(1).

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peded by private quarrels or hampered by fear of subjection to private litigation. In other words, the reason is securing a public interest of personality of the state as a public person which includes efficient functioning of the machinery of government.⁶⁵

As to immunities based on rank there was a medieval saying: "Tell me the man and I will tell you the right."⁶⁶ A man's rights, duties and immunities were those of the class in which he found himself. One type, of which a remnant obtained till the present century, was princely rank. Certain privileges of members of reigning houses and of houses which had been deprived of sovereignty by the Congress of Vienna (1815) were preserved by the German Civil Code in 1896.⁶⁷ Immunities and privileges of nobles came to an end in France in 1790.⁶⁸ When Blackstone wrote there was not a little to be said in England as to the special position of a peer before the law.⁶⁹ About all that is left of this today is a privilege of trial before the House of Lords and against arrest in civil cases at all times instead of merely when attending.⁷⁰

65. Pound, *A Survey of Public Interests* (1945) 58 *Harvard Law Rev.* 909, 910; *id.* *The Legal Immunities of Labor Unions* (1957) 1-11.

66. Brissaud, *History of French Public Law* (transl. by Garner, 1915) 296.

67. Schuster, *German Civil Law* (1907) § 35. By this time they had ceased to give any personal advantage.

68. Brissaud, *History of French Public Law* (transl. by Garner, 1915) 303-304.

69. 1 Blackstone, *Commentaries on the Laws of England* (1765) 303-304.

70. 22 Halsbury, *Laws of England* (2 ed. 1912) 271.

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What may be called professional privileges have belonged to clergymen, lawyers, and medical practitioners. As to the clergy, they have been based on the two ideas we have seen in case of official privileges and immunities, the dignity of the profession as an instrumentality of organized society and the importance of securing the clergy in the performance of their religious duties. On the Continent, personal privileges and immunities of ecclesiastics had their origin in the Roman polity. In medieval France they had precedence over the laity and had numerous and important exemptions⁷¹ and the church had its privilege of sanctuary. A criminal could take refuge in a church, the inclosure around the church, cemeteries, monasteries, dwellings of bishops, and places where crosses were set up by the roadside.⁷² Sanctuary practically disappeared in France in the fifteenth century, but the last remnant was not given up until 1852.⁷³ It disappeared finally in Prussia in 1794, and in Sardinia in 1850.⁷⁴ The last remnant in England was abolished in 1624.⁷⁵ The category of clerical privilege has disappeared.

71. Brissaud, *History of French Public Law* (transl. by Garner, 1915) 162-168.

72. *Ibid.* 503-504.

73. *Ibid.* 163 n. 2.

74. *Ibid.* 163.

75. 21 James I, chap. 28.

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As to privileges of lawyers, the advocates performing an important function of representing those who seek justice in the courts and of assisting the courts in the administration of justice are within the reason of official privilege. But the legal adviser's privilege is professional, based on the exigencies of an important public function.⁷⁶ The privilege of the physician, where it is recognized, should rest on the same basis.⁷⁷ Wigmore makes it clear that the necessities of administration and adjudication are the sufficient ground of the one, while the case is not clear as to the necessities of medical treatment, and in the case of many callings newly taking on importance and seeking the prestige of professions, the sole basis of statutory establishment of privileges is a claim of professional dignity.⁷⁸

During the empire, Rome maintained standing armies. The soldier pursued a public calling. There was, therefore, some warrant for extending to him some privileges and exemptions. But the law went far beyond what could be justified as securing a public interest in the effective performance of the soldier's function.⁷⁹ As the army in practice chose the emperor, the soldier was

76. See the principle well stated in 8 Wigmore, *Evidence* (4 ed. 1940) §§ 2285, 2290-2329.

77. See *ibid.* §§ 2380-2391.

78. *Ibid.* § 2286.

79. Muirhead, *Historical Introduction to the Private Law of Rome* (2 ed. 1899) 392.

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the favorite of Roman imperial legislation.⁸⁰ The privileges and immunities of the Roman soldier under the empire left no trace in modern law.

In the Middle Ages charities were a concern of the church so that charitable privileges and immunities were those of the clergy. After the sixteenth century charities became secularized. A doctrine of immunity of hospitals for negligence of servants and employees had its beginning in England in 1846 in a doctrine that trust funds in the hands of a charity were not to be subjected to liability for torts of employees since they could not be diverted from the purposes for which the donee gave them.⁸¹ In 1861 the Court of Common Pleas held that where a parish vestry was by statute given the powers and duties of surveyors of highways the parish was not liable for injuries due to negligence of its workmen.⁸² The former case speaks from the exaggerated respect for the wishes of trusts and of testators which Herbert Spence called government of the living by the dead. The second case went on the idea of immunity of municipal corporations performing public functions. Both of these ideas have lost their force and the English courts overruled the two cases in 1866.⁸³ But Massachusetts in 1876,⁸⁴ following

80. There is a full exposition of the *jus militare* in Knutze, *Cursus des römischen Rechts* (2 ed. 1879) 648 et seq.

81. *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & F., 507 (1846).

82. *Holliday v. St. Leonards*, 11 C.B.N.S. 191 (1862).

83. *Mersey Docks Trustees v. Gibbs*, 11 H.L.Cas. 686 (1866).

84. *McDonald v. Middlesex General Hospital*, 120 Mass. 432 (1876).

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the English decision of 1861, and Maryland in 1885,⁸⁵ following the English case of 1846, each court apparently in ignorance of the overruling of those decisions, laid down a doctrine of general immunity of charitable institutions which was for a time generally accepted in America. In 1942 the course of decision changed.⁸⁶ As it stands in the United States today, in only eight jurisdictions is the doctrine of immunity of charitable hospitals completely adhered to and in more than one of these the reason is expressly given that the rule established in the state can only be changed by legislation. Seventeen states adhere to this form of immunity in part. Twenty-one states now reject the immunity altogether, sometimes overruling a long line of prior decisions.⁸⁷ The immunity of charitable institutions is all but given up.

Marital and parental immunities⁸⁸ have their basis in ideas which came down to us from the kin-organized societies of the beginnings of law in which the household instead of the individual human being was the legal unit. Internally it was made up of the head and the dependent members. Externally the head stood for the whole. In

85. *Perry v. House of Refuge*, 63 Md. 20 (1885).

86. *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 76 U.S.App.D.C. 123 (1942).

87. *E. g. Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash.2d 162, 260 P.2d 765 (1953); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954); *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957).

88. See also *ante*, § 84.

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the English common law it was said that husband and wife were in law one person. But this was only a way of saying that the wife could not maintain an action against the husband for wrongs inflicted upon her. The privileges and immunities of the husband and father were twofold: marital and paternal.

Originally it was said that the husband was entitled to the custody of his wife.⁸⁹ If the wife insisted on living apart from him he could obtain from the ecclesiastical court a decree of restitution of conjugal rights enforceable by attachment of the person. This mode of enforcement was abolished in 1884.⁹⁰ But in 1891 a husband, on the authority of the *Cochrane Case*,⁹¹ locked his wife up in his house because she refused to live with him. She was released on *habeas corpus*. It was held that the *Cochrane Case* was no longer law and this feature of marital privilege and immunity came to an end.⁹² But the wife had no remedy for damages for false imprisonment.⁹³ Also it had been held that if the wife misbehaved the husband had a privilege of moderate correction,⁹⁴ and it was said this went to the extent of chastisement with a whip

89. *Matter of Cochrane*, 8 Dowl. 630 (1840).

90. Act to Amend the Matrimonial Causes Act, 47 & 48 Vict.C. 68, § 5 (1884).

91. *Supra*, n. 87.

92. *Reg. v. Jackson*, [1891] 1 Q.B. 671.

93. *Phillips v. Barnet*, 1 Q.B.D. 436 (1876).

94. *Rex v. Lister*, 1 Stra. 478 (1768).

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or rattan no thicker than the thumb. This privilege of chastising an errant wife was regarded in the eighteenth century as at least obsolescent.⁹⁵ Although it was recognized in the United States to some extent as a defense against prosecution for assault and battery,⁹⁶ it was in the end denied or given up.⁹⁷ However, a strong line of decision still holds that the wife can have no action against the husband for wrong to the person.⁹⁸ The reason for this remnant of marital immunity will be considered in connection with parental immunity. But even this last vestige of the immunity of the head of the household is disappearing.

A privilege of reasonable chastising or moderate correction by parents or persons in *loco parentis* is universally recognized. Where the "correction" is excessive, going beyond the limits of the privilege, there may be a criminal prosecution or a proceeding in some court charged with domestic relations or the custody of children. But beyond this privilege is there immunity from liability for tortious injury to persons in domestic relations? In the leading English case, an action for assault

95. 1 Blackstone, Commentaries on the Laws of England (1765) 444-445.

96. *Bradley v. State*, 1 Miss. 156 (1824); *State v. Rhodes*, 61 N.C. 453 (1868).

97. *Fulgham v. State*, 46 Ala. 143 (1871); *Com. v. McAfee*, 108 Mass. 458 (1871); *Clingan v. State*, 135 Miss. 621, 100 So. 185 (1924); *State v. Oliver*, 70 N.C. 60 (1874); *Edmond's Appeal*, 57 Pa. 232 (1865).

98. *McCurdy, Tort Between Persons in Domestic Relation* (1930) 43 Harvard Law Rev. 1030, 1040-1041.

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and battery brought by a wife who had been permanently injured in health and put to great expense for medical assistance it was held that the Married Women's Act did not expressly authorize actions by the wife against the husband for injuries inflicted during marriage and that litigation between members of the household was contrary to the policy of the law. The only remedy was by divorce or prosecution for assault and battery.⁹⁹ This was followed by the Supreme Court of the United States,¹⁰⁰ and the majority of state courts have held accordingly.

Two reasons have been given for this course of decision: (1) That the settled course of decision at common law which denied litigation between members of the household should stand until changed by legislation, and (2) that there is a clear and settled policy of the law against disrupting the domestic relations by litigation. But a strong and growing majority of courts recognize a right of action by one spouse against the other for tort primarily affecting the person.¹⁰¹ Where the tranquility of the household has already been disrupted by severe injury to the person there is nothing to be saved by invoking obsolete immunities. Moreover, this reason has

99. *Phillips v. Barnet*, 1 Q.B.D. 436 (1876).

100. *Thompson v. Thompson*, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180 (1910).

101. *McCurdy*, *Torts Between Persons in Domestic Relation* (1930) 43 *Harvard Law Rev.* 1030.

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no application to cases of serious injury to a child by negligent operation of an automobile by a parent required to carry insurance against injuries caused by its operation. As the real controversy here is between the child and the insurer, a number of courts allow the action.¹⁰² Other courts allow the action where the parent commits the tort while acting in a vocational as distinguished from a personal capacity.¹⁰³ Others allow an action against the parent in case of wilful and malicious torts.¹⁰⁴ The argument from legislative silence cannot serve to salvage anachronisms today. The doctrine that statutes in derogation of the common law are to be construed strictly is itself an anachronism and in an era of socialization of law has lost whatever hold it once had.¹⁰⁵ Accordingly the Supreme Court of Pennsylvania considered that the statute governing death by wrongful act was a declaration of public policy on the whole subject and would necessarily displace any policy against a child maintaining an action against a surviving parent for damage resulting from a wrongful act causing the death of the other.¹⁰⁶

102. *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930); *Lusk v. Lusk*, 113 W.Va. 17, 166 S.E. 538 (1932).

103. *Wright v. Wright*, 229 N.C. 503 (1948); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Borst v. Borst*, 41 Wash.2d 642, 251 P.2d 149 (1952).

104. *Emery v. Emery*, 45 Cal.2d 421, 289 P.2d 218 (1955); *Cowgill v. Boock*, 189 Or. 282, 218 P.2d 445 (1950).

105. See *ante*, § 110.

106. *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939).

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Obviously the last remnant of immunity in the domestic relations is moribund.

In the common law a landowner or occupier long had a privileged position, exempting him from the general principle of liability for negligence as to those who came on his land and were injured.¹⁰⁷ As a general proposition the occupier of land had no duty to keep it in reasonably safe condition so that those who came upon it would not be subjected to unreasonable risk of injury. As to trespassers there was no duty other than not to injure them intentionally.¹⁰⁸ Also in case of a licensee it was enough if he was warned of dangers actually known to the occupier. Subjection of the licensee to an unreasonable risk of injury by failure to inspect and know of hidden dangers created no liability.¹⁰⁹

In the case of persons invited to come upon the land by the occupier, such as those coming upon business, the owner or occupier was bound to make a reasonable inspection to discover dangers and to disclose them, but not

107. James, *Tort Liability of Occupiers of Land* (1953), 63 *Yale Law Journ.* 144; *id.* *Duties Owed to Licensees and Invitees* (1954) *ibid.* 605. See also *ante*, chap. 7, 2, (c) (12).

108. A typical case was *Santora v. New York, N. H. & H. R. Co.*, 211 *Mass.* 464, 98 *N.E.* 90 (1912) in which a two-year old child who had strayed upon the track was run over by an engine and three cars backing at a moderate rate of speed. There was evidence that if the engineer had kept a lookout he could have seen the child 600 feet before she was struck. It was held there could be no recovery. To create liability there must have been wilful misconduct—what would amount to intentional injury.

109. *American Law Institute, Restatement of the Law of Torts* (1934) § 333.

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to remedy them.¹¹⁰ But it has come to be seen that these immunities of owners and occupiers of land were out of place in the crowded world of today. As the Supreme Court of Vermont put it: "Traced to its source, the rule exempting a landowner from liability to a trespasser injured through the condition of the premises is found to have originated in an overzealous desire to safeguard the right of ownership as it was regarded under a system of landed estates long since abandoned—under which the law ascribed peculiar sanctity to rights therein."¹¹¹ To-day these immunities which had long been well established are steadily giving way. The general principle of liability for casting an unreasonable risk of injury upon others is applied for child trespassers¹¹² and also adult trespassers where there is manifest likelihood of their being present and suffering harm.¹¹³

A significant example of how the law has been moving with respect to these privileges and immunities is well brought out in case of the landlord's power and privileges of distress for rent.¹¹⁴ In medieval English law the feudal lord could enforce the duties of those who owed

110. *Ibid.* §§ 340, 343.

111. Powers, J. in *Humphrey v. Twin State Gas & Elec. Co.*, 100 Vt. 414, 418, 139 A. 440, 442, 56 A.L.R. 1011 (1927).

112. *Mayer v. Temple Properties*, 307 N.Y. 559, 122 N.E.2d 909 (1954).

113. American Law Institute, *Restatement of the Law of Torts* (1934) § 305.

114. See *ante*, § 142, 1.

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him duties incident to holding estates under him by distraining, that is, seizing and holding cattle or goods found on the land. Out of this grew the common-law privilege of landlord's self-help by seizing and holding movable property brought upon the land by the tenant, whether tenant's property or the property of some one else, to enforce the payment of rent. Thus the landlord could secure himself by self-help even to the extent of the property of third persons to which he had no claim except that it had been brought upon his land.¹¹⁵ Distress for rent was not received as part of the common law in five states and was abolished in five more, including New York.¹¹⁶ It has been superseded by statutory remedies or greatly restricted in all other jurisdictions. The statutes are construed strictly against the landlord and in favor of the tenant.¹¹⁷

§ 122. IMMUNITIES OF LABOR UNIONS.¹ Immunities relieving particular persons or classes of persons from the duties or liabilities appointed by law for their fellow men have been regarded from of old as odious. But because of a deep-seated feature of human nature they have been a fairly constant phenomenon in legal

115. 3 Blackstone, *Commentaries on the Laws of England* (1767) 15.

116. *Conkey v. Hart*, 14 N.Y. 22 (1856). See 52 *Corpus Juris Secundum* (1947) 517-518.

117. *Beale, Inc. v. Hawley*, 116 Fla. 445, 156 So. 529 (1934).

1. Pound, *The Legal Immunities of Labor Unions* (1957).

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history. In the maturity of law, however, most of the immunities which had come down from the past are gradually disappearing and few are left in the law of today. Yet a new species of immunity has sprung up: Legislation, as an English court put it, intended to relieve certain organizations from the humiliating position of being on an equality with the rest of the King's subjects.² The origin of common-law immunities of landowners has been referred to an overzealous desire to safeguard ownership of land in the lawless society of the earlier Middle Ages.³ It should be remarked, however, that the landowners had a high degree of political power then and long afterwards which could give exaggerated weight to their just claims. Similarly, as the law which had developed for rural agricultural societies came to be applied to urban industrial societies, the just claims of workers, calling manifestly for a security they lacked, became zealously over-secured in view of the political power which labor organizations possess in the society of today.

As Anglo-American law stood at the end of the formative period of American law, the grievances of the workingman as to the law had been numerous and very real. In an era of huge incorporated industrial enterprises there had come to be gross inequality of bargaining

2. Darling, J. in *Bussey v. Amalgamated Society of Railway Servants*, 24 Times Law Rep. 43 (1908).

3. *Humphrey v. Twin State Gas & Elec. Co.*, 100 Vt. 414, 418, 139 A. 440, 442, 56 A.L.R. 1011 (1927).

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power between the incorporated employer and the individual workingman. Traditional jealousy of organizations, going back to the time when politically organized society was engaged in a struggle with masterful kin-groups, stood in the way of effective use of collective pressure to obtain fair contracts. Traditional sanctity of property restricted effective employment of collective action in case of strikes. Enormously increased danger to life and limb in industrial employment, inadequately secured against by the common law as administered by courts hampered by the traditional law of master and servant—the fellow servant rule, the doctrine of assumption of risk, the simple tool rule and rules as to contributory negligence—along with traditional ultra-technical legal procedure resulted in a legal system which put the worker in a condition amounting almost to subjection. Reaction was inevitable. It was not unnatural that as the law broke away from this, in view of the political power acquired by labor organizations, overzealous securing of the newly recognized and delimited interests should develop immunities quite out of line with modern law. It is not too much to say that the labor leader and labor union now stand where king and governor and high official and landowner, and husband and father stood at common law.

This is not the place for a detailed study of labor-union immunities. They rest upon four established fea-

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tures of American labor law as it has developed through legislation within a generation:

(1) There is substantial elimination, as against labor organizations, of what in practical effect is the assured method of enforcing the law applicable to every one else.⁴

(2) Refusal of labor organizations to be treated as legally responsible organizations and so legally tangible entities creates substantial all-round immunities. Labor unions have thus far successfully opposed all attempts to require incorporation.

In cases of strikes in industries and enterprises having to do with interstate commerce, now given the widest possible ambit in this connection, the National Labor Relations Act of 1935⁵ went a long way to establish a practically complete immunity of labor organizations for torts. Section 7 (rights of employees) guarantees to employees the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." There is no limit imposed upon the measures employed or the effects of the concerted activities. Then follows a section defining five "unfair labor practices" on the part of employers and section 10 provides elaborately for preventing them. No provision is made defining unfair practices by employees or unions and no means of prevention or of securing against them is provided.

4. Act of March 23, 1932, 47 St. 70, 29 U.S.C. § 101; N.J.Stat.Ann. § 2:29-77; N.Y.Civ.Pr.Act, § 876a; Oregon Comp.Laws (1940) §§ 102 ff. [ORS 651.020 ff.]; Pa.Stats. (Purdon, 1941) § 206a ff.; Wis.Stats. (1945) [W.S.A.] § 103.51 ff.

5. Act of July 5, 1935, 49 Stat. 479.

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This extreme immunity was somewhat mitigated by the Labor Management Relations (Taft-Hartley) Act, 1947.⁶ It provided a list of six unfair labor practices of labor organizations or their agents, put limitations on boycotts to the extent of four purposes and made some provision as to enforcement of the limitations. But these provisions exempt individual members or their assets from liability and, as they do not authorize execution against or attachment of funds, the assets of labor organizations, they leave enforcement to supplemental proceedings to discover assets and proceedings in the nature of equitable execution to enforce the judgment. Thus the remedy is dilatory, protracted, involving successive suits, and of doubtful efficacy.

In truth, the actual immunities of labor unions have a basis much beyond the reach of theoretical liability. The real protection of the general security against wrongs to person or property is the doctrine of *respondet superior*—liability of those who act through agents or others under their control for wrongs done by those under their control when acting as such and in the course of their employment. The members of a union are not its agents, and the union is not liable for the acts of its members in the course of a labor dispute.⁷ As to the possible effect of section 301 of the Labor Management Relations Act, we are told: "There is abundance of legislative material . . . to show that it was not the intention of Congress to make labor organizations liable for the acts of their members."⁸ A mere general pronouncement of suability of unions for "unfair practices" of itself can have little real effect. In theory the Act makes the general rule of the law of agency equally applicable to

6. 61 Stat. 136, June 23, 1947.

7. American Law Institute, Restatement of Agency (1933) § 328.

8. Cox, Some Aspects of the Labor Management Relations Act (1948) 61 *Harvard Law Rev.* 274, 307, note 99.

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employers and employees. Even the application of a long settled principle of the common law equally to both sides of the employer-employee relation is objected to by the labor leaders and their apologists. We are told that the Act seems to declare the indifference of the government toward the spread of labor unions, and so "removes one of the most effective arguments of the labor organizer . . . that in joining a labor union [the employees] were following their Government's desires."⁹

Employer and union are by no means equal before the law under the amendments made by the Taft-Hartley Act. The employer is held for what his employees do in the course of their employment. The union is not held for what is done under its aegis to further its ends by its members. We are told that the union leaders avow a belief that actions for damages may be utilized to destroy local unions.¹⁰ The unions are to be guarded "against a potentially crushing liability."¹¹ No one else has protection against wrongdoing lest it crush them financially. A manufacturer can be put in bankruptcy by having to pay for wrongs done third persons by carelessness of his employees. The claim of the unions under the National Labor Relations Act to be the favorite of the Government¹² and to be exempt from equality before the law is not much impaired in practical result by the Taft-Hartley Act. Restriction upon the activities of employers in labor relations are given the backing of administrative enforcement by a board set up specially for the purpose, provided with ample machinery for its tasks, and fortified by power given the federal courts to enforce the

9. Ibid. 25.

10. Ibid. 311.

11. Ibid. 309.

12. Cox, *Some Aspects of the Labor Management Relations Act* (1947) 61 *Harvard Law Rev.* 1, 24.

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board's orders by injunction and proceedings for contempt. There is no comparable machinery of enforcement on the employer's side. Furthermore, the statutory protection of picketing in actual practice covers much serious invasion of what are the secured legal rights of every one but an employer. The purpose of "peaceful picketing" is supposed to be to give notice of a labor dispute to the general public. But apart from the Pickwickian peacefulness, giving notice by repeated trespassing and obstructing of access to one's property would be stopped by the courts if done by any one else.

It may be, however, that the Taft-Hartley Act marks the beginning of a recession which will some day relegate the immunities of labor organizations to the limbo of obsolete and decayed immunities of the past. At any rate, at one point labor organizations and their officers have failed to establish a claimed immunity. In 1934 Congress enacted what was called the Anti-Racketeering Act making extortion in connection with trade or commerce criminal.¹³ An exception in this Act left extortion by unions and their officers unaffected. This exemption was removed by the Hobbs Act,¹⁴ thus making extortion affecting commerce a federal offence.¹⁵ The statute came up for interpretation in *United States v. Green*,¹⁶ a prosecution for extorting from an employer in interstate commerce by active and threatened force, violence and fear, wages to be paid for imposed unwanted, superfluous and fictitious services. The defendants were a union and its agent. It was argued for the union that the statute did not cover what is called "featherbedding." The court held, rejecting an argument based on decisions that attempts by unions to secure "made work" for their members were not "un-

13. 48 Stat. 979.

14. 60 Stat. 420 (1946).

15. The law as it now stands is Title 19 of the U.S.Code § 194 (1948).

16. 350 U.S. 415, 76 S.Ct. 522, 100 L.Ed. 494 (1956).

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fair labor practices," that the Act was not intended to protect unions or their officials in attempts to get money or property through threats of force or violence. At this one point the growth of immunities of labor organizations has been arrested.

Immunities of labor organizations have extended to breaches of contracts no less than to torts. Before the Taft-Hartley Act a collective bargain between an employer and a labor union was only binding in practical effect on one side. The Norris-La Guardia Act "insulated labor unions in the field of injunctions against liability for breach of contract."¹⁷ In practical effect the unions had a general immunity for breach of contract. The terms of the collective contract bound the employer. They did not bind the union.¹⁸ Section 301 of the Taft-Hartley Act sought to remedy this condition. But the practical result of section 301 towards achieving equality of enforcement on each side of a collective bargain with a labor union is by no means clear. For a time, at least, the employer could only apply to the National Labor Relations Board¹⁹ or a state board on its model. The question came up again at the time of the violent mass picketing and rioting during the Kohler strike in Wisconsin. In that state a statute creating an Employment Relations Board made certain conduct a ground of injunction by the Board. Such conduct was also an unfair labor practice under the federal statute, subject to be dealt with by the National Labor Relations Board. The Wisconsin Board enjoined the riotous picketing in the Kohler strike and the State Supreme Court upheld the injunction.²⁰ On

17. Cox, *Cases on Labor Law* (3 ed. 1954) 700.

18. Report of Senate Committee on Labor and Public Welfare (1947) S.Rep. 105, 80th Congress, 1st Session, 15-19.

19. *Garner v. Teamsters Union*, 346 U.S. 437, 74 S.Ct. 161, 98 L.Ed. 228 (1955).

20. *Wisconsin Employment Relations Board v. United A. A. & A. J. Workers*, 269 Wis. 578, 70 N.W.2d 191 (1955).

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review in the Supreme Court of the United States it was argued that the National Labor Relations Board alone had jurisdiction over the controversy because of the relation of the employer's business to interstate commerce. The court held, three justices dissenting, that in the emergency created by the violent and riotous picketing the state Board might act. There is in this case very little yielding of union immunity. It is complete against any state protection of individual rights and as to securing of public peace and order is confined to emergencies. Only a labor organization is allowed to disturb the peace and back up its claims by force and violence to the extent of not creating an emergency.

It must be borne in mind that employees are regarded as having a vested right in the job while and after ceasing to work and preventing others from working and the employer's work from going on. Section 2, paragraph 3, of the National Labor Relations Act provides that the term employee "shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." Under this section, strikers may be reinstated after a strike and the Board has a large discretion in ordering reinstatement.²¹ We are told that there ought not to be equality before the law as between employers and labor unions. The law should keep its hands off and leave all questions as to labor relations to administrative determination: They should not be legal questions at all.²² No other group of persons claims to have its rights and duties defined by

21. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S.Ct. 904, 83 L.Ed. 1381 (1938); *National Labor Relations Board v. Elkland Leatherboard Works*, 114 F.2d 221 (C.C.A.3d, 1940).

22. Shulman, Reason, Contract and Law in Labor Relations (1955) 68 *Harvard Law Rev.* 999, 1224.

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the discretion of an administrative authority set up for its benefit.

In *Mastro Plastics Corp. v. National Labor Relations Board*,²³ in the collective bargaining contract the union contracted "to refrain from engaging in any strike or work stoppage during the term of the agreement." Also section 8d of the National Labor Relations Act deprived individual workers of their status as employees if within the waiting period prescribed by subparagraph (4) they engaged in a strike. There was a contest between rival unions in order to become the negotiating representatives of the employees. The employer opposed replacing one by another on the ground that the latter was communist dominated and discharged one of the members of the latter who was active in the controversy. Thereupon during the waiting period fixed by the statute there was a strike which closed up the employer's plant for some months. It was held that discharge of the employee and financial assistance to one of the contesting unions were such unfair labor practices as to bar the employer from insisting on the no-strike agreement and waiting period and relieved the union which struck from the requirement of a waiting period before striking. The court treats the no-strike agreement as a "waiver," that is, as a voluntary relinquishment of a known right. But it did not stand by itself as a mere waiver. It was a term of a contract. It could not be withdrawn, leaving the contract of employment in full force as giving the workers the status of employees unless the breach by the employer went to the essence of the contract. Such is the rule applicable to every one else.

A related phenomenon is relieving labor organizations and their members from the general legal duties of persons engaged in performing public service. At common law such persons were under a duty incident to their calling to perform continuously

23. 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956). Frankfurter, Minton, and Harlan, JJ. dissented.

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a reasonable service²⁴ and might be compelled to do so by appropriate and effective legal remedies.²⁵ A public service company could not abandon its service even if unprofitable and might forfeit its charter if it did so.²⁶ These propositions were well established long ago as to every one professing a public employment. Likewise the courts were beginning to hold that while employees of a public service company remained employees they were affected with a public character, to some extent at least, and could not be suffered to hold the employment and refuse to perform the work of the public employment. But the National Labor Relations Act and the Norris-La Guardia Act, leaving the legal duties of the public-service employer what they were, cut off all holding of the employees to any duty toward the public. Organized employees can compel stoppage of public service, prevent others from taking their places, and, while doing so, hold up the public indefinitely even in breach of a no-strike provision in their collective bargain agreement. Nor is this all. Although the statute in New York excludes employees of charitable, educational, or religious associations from the exemptions created by the Labor Law, that applies only to procuring concerted ceasing to work. There may be an injunction against striking "and organizing for the purpose of striking or inducing others to strike against the plaintiff or the hospital operated by the plaintiff." But picketing, which in practical effect will close up the hospital, is not to be restrained.²⁷

Under the circumstances of employment today membership in a union may be an absolute prerequisite of obtaining or re-

24. Wyman, *Public Service Corporations* (1911) §§ 330-331.

25. E. g. *Mandamus*. The leading case is *People v. New York Central & H. R. Co.*, 28 Hun (N.Y.) 543 (1883).

26. *People v. Albany & V. R. Co.*, 24 N.Y. 261 (1862).

27. *Society of the New York Hospital v. Hanson*, 185 Misc. 934, 937, 60 N.Y.S.2d 589, 59 N.Y.S.2d 91 (1945).

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taining employment. But unions have very wide powers of expelling members who do not follow the orders of those in control. Eighteen states have provided either by statute or by constitutional provision that any agreement or understanding which conditions the right to work in any occupation upon membership or non-membership in a labor union is void. But this legislation cannot govern where Congress under the commerce clause of the federal constitution has preempted the field by the National Railway Labor Act which, unlike the Taft-Hartley Act, does not allow state right-to-work laws. The controlling decision is *Railway Employees Dept. A. F. of L. v. Hanson*,²⁸ holding that the union-shop provision of the National Railway Labor Act²⁹ was within the powers of Congress under the commerce clause and did not contravene the First or Fifth Amendments of the Constitution of the United States. As the Union Pacific railroad is a great highway of interstate commerce, the authority of Congress to provide for its efficient operation as such was considered clear. The ground of decision was that the union shop was a "stabilizing force" in labor relations in commerce.

But a potent stabilizing force may be a despotic centralized control. As Mr. Justice Brandeis once put the matter, it may substitute one form of tyranny for another, to substitute tyranny of centralized employee oligarchies for tyranny of the employers.³⁰ Under the interpretation of the commerce clause of the federal constitution which now obtains, very little of business or industrial activity of any sort is left to regulation or protection by the states. Centralization of control over employment in national or international bodies able to apply an overwhelming pressure to small local enterprises suggests serious consequences

28. 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

29. 64 Stat. 1232, § 2, eleventh (1951).

30. Mason, Brandeis, *A Freeman's Life* (1942) 303-304.

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of a universal union-shop regime through federal regulation of commerce.

It will be seen that the law is very far from covering effectively the individual right to work as against labor unions although it is made increasingly effective against every one else.

As organized in local voluntary societies, governed by national voluntary associations, the trade unions are strictly operated oligarchies. There is centralized power and diffused legal responsibility, amounting to irresponsibility.³¹

Though controlling huge funds, which they have come to use for partisan political purposes, statutes regulating political contributions by utilities and corporations have not governed contributions of funds by unions.³² By persistent and successful resistance to incorporation, which would make them responsible legal entities, the unions have been able to escape tort liability,³³ liability of funds for breach of contract, and restraint by *quo warranto* of abuse of collective power. Yet a union may get a decree of specific performance of a contract with an employer, as part of a collective bargaining agreement to recognize and give effect to assignments of future wages of employees for union dues.³⁴

31. See the description of the mode of organization by a sympathetic writer, Cox, *Cases on Labor Law* (3 ed. 1954) 15-17.

32. In Massachusetts a statute requires the president and secretary of labor unions to report to the Commissioner of Labor and Industries as to the salaries of their officers, the scale of dues, initiation fees, fines and assessments and all expenditures, the report to be open to public inspection. *Bowen v. Secretary of the Commonwealth*, 320 Mass. 230 (1946). But this could not reach the national organization which exercises ultimate control. Moreover, the sanction provided is ineffectual.

33. In England a trade union can sue in tort but cannot be sued in tort. *National Union v. Gilliam*, [1943] 1 K.B. 81, 88.

34. *Sanford v. Boston Edison Co.*, 316 Mass. 631, 56 N.E.2d 1 (1944).

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A move in the direction of making unions responsible legal entities was made in sections 301 and 303 of the Taft-Hartley Act. But it is doubtful how far this will prove effective. In the Coronado Coal Company Case³⁵ it was held that members of a labor union could be sued "in their common name." But state courts generally have refused to follow that decision in the absence of a statute.³⁶ By applying to the National Labor Relations Board and getting an order which that Board can enforce through the courts the unions can have all the procedural benefit of a legal entity without the disadvantages.

(3) Not distinguishing unlawful action by labor organizations, their leaders and their members, done outside of the employer-employee relation from practices in that relation has led to immunities beyond any legitimate claim to secure workers as a class against exploitation by employers.

Exemptions of labor unions from liability for wrongful acts and practices defined by the antitrust laws has been reached by a gradual course of decision culminating in *Hunt v. Crumboch*³⁷ in which the Supreme Court of the United States, dividing five to four, went the whole way of complete immunity. As Jackson, J. dissenting put it: "This court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because it does not

35. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1921).

36. The cases are collected in 91 *University of Pa. Law Rev.* 529, n. 8.

37. 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954 (1945).

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like him. The court permits to employees the same arbitrary dominance over the economic sphere which they so long, so bitterly, and so rightly asserted should belong to no man.”³⁸

It is not merely that labor unions are exempted from the provisions of the statutes against combinations and agreements in restraint of trade. They may actively interfere with trade and commerce with immunity from what is often the only effective remedy.

(4) Finally, serious immunities are involved in committing all matters affecting labor organizations to an administrative agency instead of confining its jurisdiction to matters involved in the employer-employee relation.

State statutes regulating union activities have had a hard time in the courts in view of judicial identifying of picketing with freedom of speech, and the construction of interstate commerce in connection with the National Labor Relations Act, extending the jurisdiction of the National Labor Relations Board to local business or industrial activities of the most remote relation to commerce between states.

It may be said that as the labor organizations have the National Labor Relations Board and like administrative agencies in the states to look after their interests, special administrative

38. 325 U.S. at p. 831, 65 S.Ct. at p. 1550.

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agencies are likewise set up for all important interests. For railroad and transportation companies there is the Interstate Commerce Commission; for banks, banking commissions in all the states; for financing organizations and agencies the Securities and Exchange Commission; for manufacturing and selling organizations the Federal Trade Commission; and for insurance companies, insurance commissions in each state. But these commissions are not set up to protect the interests with which they have to do in immunities but to protect the public from them. By contrast the National Labor Relations Board and like administrative agencies in the states, along with the legitimate function of assuring equality in collective bargaining between employer and employee and securing the rights of employees in that relation, have also acquired a function of upholding immunities of labor organizations and their leaders at the expense of the public. They do not protect the public. In such matters as procedure in violation of antitrust laws, restraint of trade and interference with commerce, security of private property, and the right to work they protect labor organizations against the public. For example, the Federal Court of Appeals for the Fifth Circuit had held that the remedies provided by the National Labor Relations Act were "public not private remedies, that orders and decrees are entered not in vindication of private but of public rights."³⁹ The judgment dismissing on this ground the Board's proceeding to enforce its order was reversed by the Supreme Court which held that the "court is bound to enforce the Board's orders."⁴⁰ The statute gives rights to the unions to be enforced as such. It is not a question of duties toward the pub-

39. *National Labor Relations Board v. Warren Co., Inc.*, 214 F.2d 481, 484 (C.A.5th, 1954).

40. *National Labor Relations Board v. Warren Co.*, 350 U.S. 107, 76 S.Ct. 185, 100 L.Ed. 96 (1955).

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lic as to labor relations. Requirements imposed for the protection of the public are only enforceable by criminal prosecution.⁴¹

Unions are entitled to the benefits of the National Labor Relations Act although they do not or even intentionally fail to comply with its requirements of information and affidavits as to their activities and those of their officers. State and federal courts must apply the provisions of the Act against the employer notwithstanding.⁴² It is said: "The union's failure to file was not a confession of guilt of anything. It was merely a choice not to make public certain operations."⁴³ Litigants generally do not receive such considerate treatment when they fail to comply with the requirements of a statute.

Labor leaders, in criticising the Taft-Hartley Act, tell us that they "object to being pushed around." That is, their dignity is offended by subjecting them to the duties and liabilities imposed by the law upon every one else. What Mr. Justice Frankfurter calls "the ultimate thrust of the consideration of fair dealing" is weighing decisively against mere dignity in every connection.⁴⁴ The dignity of the sovereign, of the state, of the noble, and of the official have had to yield to the demand for equal justice to all.

It has apparently become accepted usage to regard as a labor dispute any situation in which a union uses its monopoly power—occasionally with the prearranged assistance of other

41. *Leedom v. International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145, 77 S.Ct. 154, 1 L.Ed.2d 201 (1956); *Amalgamated Meat Cutters & Butchers W. A. v. National Labor Relations Board*, 352 U.S. 153, 77 S.Ct. 159, 1 L.Ed.2d 207 (1956).

42. *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 76 S.Ct. 559, 100 L.Ed. 941 (1956).

43. *Douglas, J.*, *ibid.* 69.

44. *National City Bank of N. Y. v. Republic of China*, 348 U.S. 356, 365, 75 S.Ct. 423, 429, 99 L.Ed. 389 (1955).

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unions—simply to promote economic controls in order to promote the financial positions of itself and its constituent unions. Such activity is termed a labor practice in order to bring it within the jurisdiction of the administrative agency taken to be charged with advancing the interests of the unions. But is it not rather an unfair *business* practice of the union just as a like practice of a business or industrial organization with the same motive would be called an unfair business practice to be dealt with as such by the courts?

It is said, however, that this extension of the concept of “unfair labor practice” is a logical development from the original premise underlying modern labor law. But is it not rather a fortuitous development of an idea of general legal irresponsibility of a legal union in reaction from the strict doctrines and harsh rules which with the rise of industry had grown up in the common law and legislation of eighteenth-century England and were taken over in the pioneer agricultural era of formative America? Instead of taking the extended concept of “unfair labor practice” for a final starting point, “labor dispute” and “labor practice” should be held to their true meaning of practice in the employer-employee relation. Activities of unions outside of their proper sphere and injurious to the economic order should be looked upon just as we look at such activities of other organizations.

Indeed the concept of “unfair labor practice” grew up with respect to the relation of employer and employee in bargaining. Practices outside of this and affecting the public in general relations of trade and commerce, whether of employers or employees, can only be put as labor practices in order to secure trade union monopoly immunity. To put everything done by trade union or by their members under their aegis under the jurisdiction of the National Law Relations Board, not limiting the jurisdiction of that Board to bargainings between and relations of employer and employee results practically in subjecting everything done in the name of or by direction of a union or its leaders as to their

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general advantage. It is not a legitimate purpose of labor law to free unions or their members to do whatever their leaders conceive to be to the general advantage of organized labor in the way of restraining trade and commerce and destroying competition.

A general policy of restraining unchecked power has always been regarded as at the foundation of a sound polity.

Chapter 24

Duties and Liabilities

§ 123. Conceptions of Subjection to Exaction or Control.

Chapter 24

Duties and Liabilities

Section 123

CONCEPTIONS OF SUBJECTION TO EXACTION OR CONTROL.¹

1. *The idea of subjection to exaction or control.* It has been suggested that there are juristic conceptions of exaction or control (legal rights in the stricter sense and powers) and juristic conceptions of non-restraint (liberties and privileges).² There are also juristic con-

1. Austin, *Jurisprudence* (5 ed. 1885) lects. 17, 22-26; Holland, *Jurisprudence* (13 ed. 1924) chap. 7; Salmond, *Jurisprudence* (9 ed. 1937) § 77; Gray, *Nature and Sources of the Law* (1909) §§ 45, 46, 59-61 (2 ed. 1921) 15-17, 23-25; Korkunov, *General Theory of Law* (transl. by Hastings, 1909) § 29; Hearn, *Theory of Legal Duties and Rights* (1884) chap. 4; Miller, *The Data of Jurisprudence* (1903) chap. 3; Terry, *Leading Principles of Anglo-American Law* (1884) §§ 108-112; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 38; Kocourek, *Jural Relations* (1927) 9-10, note; Pound, *Introduction to the Philosophy of Law* (rev. ed. 1954) lect. 3; Corbin, *Rights and Duties* (1923) 33 *Yale Law Journ.* 501; Goble, *The Sanction of a Duty* (1933) 37 *Yale L.J.* 426; Allen, *Legal Duties* (1931) 156-220; Hibbert, *Jurisprudence* (1932) 178-185; Stone, *The Province and Function of Law* (1946) 98-99; Paton, *Jurisprudence* (1946) 213-214, 217-220, (2 ed. 1951) §§ 61-62.

Markby, *Elements of Law* (6 ed. 1905) §§ 181-190; Pollock, *First Book of Jurisprudence* (5 ed. 1923) 57-61; Rattigan, *Science of Jurisprudence* (4 ed. 1919) § 20; Terry, *Duties, Rights, and Wrongs* (1924) 10 *A.B.A.J.* 123; 1 Bierling, *Juristische Prinzipienlehre* (1894) § 11, pp. 109-183; Somló, *Juristische Grundlehre* (1917) §§ 123-124.

2. *Ante*, § 121, 2.

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ceptions of subjection to exaction or control (duties and liabilities). Other ways of putting this are that the law confers or recognizes advantages and imposes burdens,³ or that it confers or recognizes advantages and imposes disadvantages.⁴ Those who adhere to the threat theory of a law will consider that a legal precept threatens some subjection to exaction or control or some burden or some disadvantage. But there is much more to a body of law in the second sense than an aggregate of threats. Savigny brings out the idea very well in defining *obligatio* in the civilian's sense, that is, the relation between one who may exact an act or forbearance and one who is subject to the exaction; between debtor and creditor in the Roman sense of those terms. He says that obligation consists in "the control over another person, not over him as a whole (whereby his legal personality would be destroyed) but over single acts or dealings which must be thought of as deducted from his freedom and subjected to our will."⁵

2. *History of the idea of duty.* The general idea of a duty begins in Greek, or more specifically in Stoic, philosophy. The idea of a legal duty, as a moral duty backed by the force of a politically organized society, begins in Roman law. The term τὸ καθήκον, which Cic-

3. Salmond, *Jurisprudence* (1902) §§ 71, 77.

4. Kocourek, *Jural Relations* (1927) 78.

5. 1 Savigny, *Obligationenrecht als Theil des heutigen römischen Rechts* (1851) 4.

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ero⁶ and the Roman jurists following him translate as *officium*, comes from Zeno, the founder of the Stoics.⁷ Originally it meant the regulation of natural impulse, and distinguished from *κατόρθωμα* it comes near to the nineteenth-century antithesis of the legal and the moral.⁸ Thus the idea of a duty is historically older than the idea of a right. In the Roman law books *officium* is regularly used for duty in all its meanings.⁹ It may be moral,¹⁰ or official,¹¹ or legal.¹² We see moral duty made legal in the formula of the *actio fidei*¹³ and in the *actiones bonae fidei* with sanction of *infamia*.¹⁴ The idea of moral duty, foreshadowed by the Jewish conception of a moral law declared and enforced by God, was fully developed in Christian ethics as one of being morally bound¹⁵ and passed into the treatises on natural law un-

6. De officiis, i, 3, 10.

7. Diogenes Laertius, 108.

8. As to the Stoic idea of duty see Zeller, The Stoics, Epicureans and Sceptics (transl. by Reichel, 1892) 264-265, 287-290.

9. Dig. 5, 2, 2; 37, 6, 6; 42, 5, 23; 43, 1, 1, 2.

10. Dig. 13, 6, 17, 3.

11. Dig. 3, 3, 73.

12. Cod. 6, 6, 2.

13. Cicero, Topica, xvii, 66; De officiis, iii, 15, 61 and iii, 17, 70; Epistolae ad Familiares, vii, 12.

14. Inst. 4, 6, 28, 30, 31; Dig. 7, 2, 1.

15. E. g. St. Ambrose De officiis ministrorum—showing the effect of the Stoic and Ciceronian training of his youth. For further development see Thomas Aquinas, Summa theologiae, ii-ii, qu. 62, arts. 4-7.

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der the name of "obligation."¹⁶ Nineteenth-century writers on ethics and natural law were not agreed. Whewell saw "duty" as the term of wider meaning with "obligation" as subordinate.¹⁷ Lorimer puts duties as corresponding to rights (in the broadest sense) but seems often to use "duty" and "obligation" interchangeably.¹⁸ Fowler and Wilson define a duty as "an obligation imposed on (or perhaps residing in) some person or persons to respect the rights residing in some other person or persons."¹⁹ Miller uses "obligation" both in the Roman sense of relation and in the sense of the correlative of a right, but tells us of duties imposed by obligation, using "obligation" here in the Roman sense.²⁰ Since Austin, English and American writers on jurisprudence have consistently used "duty" for the correlative of a right, and this term, going back in the general sense at least as far as Chaucer, and in the sense of what is owed in a feudal relation even earlier, seems clearly preferable. The term "obligation" has a restricted meaning in the common law and has in the civil law the quite different

16. Doctor and Student (1532) chaps. 2, 4, 8, 12, 47; Grotius (1625) ii, 10, 1; Burlamaqui, *Principes du droit naturel* (1747) pt. i, chap. 6, §§ 9-13; 1 Rutherford, *Institutes of Natural Law* (1754) bk. i, chap. 2, §§ 6-7. Vattel, *Le droit des gens ou principes de la loi naturel* (1758) préliminaires, § 14, seems to use *obligation* and *devoir* interchangeably.

17. *The Elements of Morality* (4 ed. 1864) §§ 85-86, p. 54.

18. *Institutes of Law* (2 ed. 1880) chaps. 7, 11.

19. *Principles of Morals* (1894) pt. 2, 141.

20. *The Data of Jurisprudence* (1903) chap. 3, §§ 1-2, 15.

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meaning of the relation between the parties to a right *in personam*.²¹

Although historically the juristic conception of a duty develops before the conception of a right, analytical jurists have discussed a question as to which is logically the primary. To Austin, a duty is the logical consequence of a command and hence a legal duty results from a law—i. e. from a rule of law. "Wherever," he says, "a duty lies, a command has been signified; and wherever a command is signified a duty is imposed."²² Pollock also considers that duty is the primary idea with a right as its correlative and makes duty his starting point,²³ but adds that duty and right are not separable or divisible but are "different aspects of the same rules and events," so that it makes no difference which aspect is taken for a starting point because in examining one we necessarily take up both.²⁴ Holland, on the other hand, considers a right (in the broader sense) as logically primary and makes it the basis of his system.²⁵ In the Anglo-American legal system in its maturity we might say that at law we start from a right (in the broader sense) while in equity we start from the idea of a duty. Kelsen, as required by the threat theory of a law, differentiates duty from liability in this connection. Since the threat may conceivably be directed to and so the duty imposed on one person, and the liability to repair damage due to breach of the duty may fall on another.²⁶ He vouches responsibility of the kinsmen of the wrongdoer in the beginnings of law and might instance the frankpledge system in medieval England.²⁷ Stone

21. See *post*, § 136, 1.

22. 1 Austin, *Jurisprudence* (5 ed. 1885) 87.

23. *First Book of Jurisprudence* (6 ed. 1929) 61-65.

24. *Ibid.* 70.

25. *Elements of Jurisprudence* (13 ed. 1924) 87-88.

26. *Reine Rechtslehre* (1934) 26-27.

27. 1 Pollock and Maitland, *History of English Law* (2 ed. 1896) 561-571.

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observes that "such a division between duty and liability violates the sense of justice."²⁸ But liability under the doctrine of *respondeat superior* is a case in point. Representation of employer by employee is a dogmatic fiction which has served to satisfy the sense of justice. Historically, it is a development of the old kin-group liability, which Kelsen vouched. It is maintained to uphold the general security and is reconciled to ideas of justice by identifying the wrongdoer with the person made liable.²⁹ May we not say that today, when so much is done through employees and by machinery, the imposing of liability upon the employer, to whom the law attributes the control, is a justifiable means of maintaining the general security which is menaced by risk of the employee getting out of control?

Duguit starts from Comte's proposition that duties must be substituted for rights in order to subordinate personality to sociability.³⁰ Hence a man's only right is a power to do his duty. There is in reality no such thing as a right.³¹ The idea of a right is religious and metaphysical. In the positive state, "which has no celestial title," it disappears.³² But Duguit's positive natural law is directed primarily at the liberties recognized by the French Declaration of the Rights of Man and guaranteed by modern constitutions rather than at the juristic conceptions by which we seek to organize and understand private law.

Duguit gives us economic morals as the basis of duty. Lundstedt gives us a general-security theory excluding morals. Lundstedt would cast out from jurisprudence both ideas, the

28. *The Province and Function of Law* (1946) 99.

29. See Holmes, *Agency* (1890-1891) 4 *Harvard Law Rev.* 345, 5 *id.* 1; Pound, *The Economic Interpretation and the Law of Torts* (1940) 53 *Harvard Law Rev.* 365, 375-378.

30. *Manuel de droit constitutionnel* (3 ed. 1915) 13.

31. Duguit, 1 *Traité de droit constitutionnel* (3 ed. 1927) 143.

32. 1 Comte, *Politique positive* (ed. of 1890) 361.

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idea of a right and the idea of a duty. He holds that legal precepts proceed from the need of order, security and self-preservation in society, and as to their origin have nothing to do with any moral ideas. Legal precepts, in his view, are dictated by necessity. Enforced for a long time, they give rise to feelings of right which we call rights and duties, and to feelings of the just and the unjust. A sense of duty or moral instinct is a consequence of the administration of criminal law for generations.³³ He holds that a duty of reparation for wrongful damage does not rest on any general sense of justice. It is necessary to the existence of the community. The rule arose from social necessity and maintenance of it in concrete cases gave rise to a feeling of justice in the abstract. Forms of legal liability have nothing to do with justice, injustice, right, duty, lawfulness or unlawfulness. They proceed from a principle of expediency, namely, that knowledge that one who causes harm is liable to make reparation tends to bring about a general sense of security by deterring harmful acts.³⁴ In the same way he holds that the law of contract has nothing to do with good faith or the binding force of a promise. It rests on the social necessity of a binding quality of exchange of valuable interests. Rights and duties have nothing to do with either contracts or torts. Breach of contract is a harm, and if one causes harm he "runs the risk of certain reactions detrimental to him."³⁵ This is a combination of the threat theory of law and social utilitarianism. As he puts it, the nature of man as a rational and social being is so far from being the *basis*

33. Superstition or Rationality in Action for Peace? (1925) 48-49, 110-111, 118, 125.

34. Lundstedt, *The General Principles of Civil Liability in Different Legal Systems* (1934) 2¹¹ *Acta academiae jurisprudentiae comparativae*, 367. See Hägerstrom, *Der römische Obligationsbegriff im Lichte der Allgemeinen römischen Rechtsanschauung* (1937) 35 ff.

35. Lundstedt, *Superstition or Rationality in Action for Peace?* (1927) 99-100.

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of law that on the contrary it is the consequence of the operation of law.³⁶ Moreover, he insists that a duty can only operate on a "subjective conscience." Hence "legal duty" can have no objective meaning, and he rejects the term.³⁷

Lundstedt's doctrine as to duties and rights is at bottom another way of saying what Llewellyn has brought out better in *The Cheyenne Way*. Any group or association or society is subject to disturbance by members at outs with one another over expectations or demands disappointed or resisted. There must be adjustment in such cases or the group or association or society will dissolve.³⁸ But these expectations or demands are not all asserted in title of the general security, and if we admit all that Lundstedt urges there is still no need of throwing over the juristic conceptions of a duty and a right. Social control, on which civilization rests, has both morals and law for agencies. Conceptions having their origin in the one have been developed and given specialized meaning in the other. Moreover, experience has shown that to have an eye solely to the general security may result in threat to the general security because of the pressure of ignored individual claims in title of the social interest in the individual life. This has been apparent in the present century in reaction from over-insistence on the general security in the nineteenth century. One might compare a like situation in international relations. Attempts to maintain peace with an idea to that interest only by the idea of balance of power, ignoring every interest but the general security, have in practice promoted rather than inhibited wars.

3. *Legal duty and moral duty.* Dr. Allen's excellent discussion³⁹ has to do chiefly with moral duties. But

36. Ibid. 23-27, 99, 103, 111, 114-115, 119.

37. Ibid. 80-83.

38. Llewellyn and Hoebel, *The Cheyenne Way* (1941) 283-289.

39. *Legal Duties* (1931) 156-220.

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certain questions as to the relation of morality and legal duty require more consideration than the analytical or analytically inclined jurist has been wont to give them.

According to Kelsen a rule of law says: "If A exists, so should B exist, without saying anything more as to the moral or political worth of the association [of the one with the other]." ⁴⁰ In other words, as it has been put, "a pronouncement as to unqualified human behavior" is followed by "a statement concerning the coercive behavior (*Zwangsakt*) of the state official." ⁴¹ But is it true either analytically or historically that the pronouncements of legal precepts as to items of behavior are unqualified as to their moral or political worth? Take, for example, the clean-hands maxim in Anglo-American equity. "It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him *in limine*." ⁴² Here there is clear qualification of items of behavior in terms of their moral value. Whether plaintiff's conduct is deemed of moral value or otherwise will determine whether or not he has standing in court. One might say

40. *Reine Rechtslehre* (1934) 23.

41. Voegelin, *Kelsen's Pure Theory of Law* (1927) 42 *Political Science Quart.* 268, 270.

42. 1 Pomeroy, *Equity Jurisprudence* (3 ed. 1905) § 397, p. 657.

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the same of the rules of Anglo-American equity as to specific performance in case of hard bargains,⁴³ and as to mistake not otherwise relievable when coupled with sharp practice.⁴⁴ Indeed, wherever standards are to be applied to conduct the items considered are likely to be qualified in terms of morals. Nor is there an unqualified pronouncement when the German Civil Code provides for liability in damages where one intentionally injures another in a manner contrary to good morals.⁴⁵

Recognition of moral duties as such has a large place in a system of law. One mode in which social interests are secured is recognition of moral duties which are not legal, as to which there are no enforceable correlative legal rights, by protecting with a privilege one who performs the moral duty to the injury of another. An example is the privilege of one who in response to a moral duty gives what proves to be unfounded information as to a crime.⁴⁶ Roman law recognized a moral duty of gratitude to the extent of making ingratitude a ground of revoking gifts to children, grandchildren, and freedmen. Justinian extended this to all gifts.⁴⁷ Revocation of gifts

43. *E. g.* *Wedgwood v. Adams*, 6 Beav. 600 (1843).

44. *E. g.* *Ellard v. Lord Llandaff*, 1 Ball & Beatty, 241 (1810). The court said: “. . . this is too sharp a practice to be countenanced here.”

45. German Civil Code, § 826.

46. *Worthington v. Scribner*, 109 Mass. 487, 488 (1872).

47. Cod. 8, 55, 10.

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for ingratitude has passed into the modern codes.⁴⁸ It surely cannot be said that there is here a legal right of exacting gratitude from the donee. There is a power of revocation in case of ingratitude, not a right in the strict sense. But the legal power is a means of giving effect to a moral duty which is thus to that extent a legal duty and yet has no legal right in the strict sense correlative to it.

Again, in Roman law a promise unenforceable as being a bare pact created a purely moral duty, and the "natural obligation" thus arising might be used as a defence, though it could not be sued on.⁴⁹ Also if a non-enforceable pact was performed, the performance is referred to an obligation and there could be no *condictio indebiti* (recovery of money paid when not owed).⁵⁰ Indeed, performance of a moral duty was held something of which a creditor could not complain as being a mere gift by an insolvent. It was *soluti retentio*. But the English Court of Chancery was not willing to go so far.⁵¹ Also where transactions of types recognized by the *ius civile* as creating obligation were for some reason denied operation or because of some civil reason had lost their actionable character, they could create natural obligations so

48. French Civil Code, art. 955; German Civil Code, § 530.

49. Dig. 2, 14, 7, 4.

50. Dig. 46, 1, 16, 4.

51. Gilham v. Locke, 9 Ves.Jr. 612 (1804).

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as to sustain a new promise, or so that performance would stand as performance of a duty legally owing. Such cases were loan of money to a slave who after being set free promised to repay,⁵² promise by a ward without the interposed authority of his tutor, and claims barred by the procedural contract or by limitation of actions where there was a subsequent promise to pay.⁵³

Lord Coleridge went so far as to lay down that "every legal duty is founded on a moral obligation." He added: "A legal common-law duty is nothing else than the enforcing by law of that which was a moral duty without legal enforcement."⁵⁴ This is true of duties enforced in equity, and no doubt of most common-law duties, especially those enforced by prosecution for common-law misdemeanors. If the term "duty" is used in a strict sense, excluding such cases as liability without fault in order to maintain the general security, the objective standard of due care in the law as to negligence, and liability under the doctrine of *respondeat superior*, it may stand as a general proposition. But it is obviously not true that all moral duties are as such common-law legal duties,⁵⁵ and the general proposition is far from true as to statutory duties, e. g. the duties imposed by the Fugitive Slave Law before the Civil War. Statutes create many legal duties which have no moral element beyond a possible moral duty to obey a law.

Moral duties are often recognized by law by giving performance of them legal consequences without making

52. Dig. 39, 5, 19, 4.

53. Dig. 12, 6, 40, pr.; 4, 5, 2, 2; 46, 1, 8, 3.

54. Reg. v. Instan, [1893] 1 Q.B. 450, 453.

55. See e. g. the Good Samaritan Cases, *ante*, § 68, notes 92-101.

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them enforceable. Thus saving life is considered an excuse for breach of a charter party.⁵⁶ One who acts to save life is not held contributorily negligent.⁵⁷ On like grounds it has been held not contributory negligence to go back along a trestle in the dark to look for the body of a near relative accidentally thrown from a train.⁵⁸ Also one is not officious, so as to preclude recovery for work done or money paid, where he acts under a moral compulsion even though not legally bound.⁵⁹ Thus law and morals cooperate as agencies of social control.⁶⁰ That in such cases the law does not enforce the moral duty but only recognizes it as a legitimate basis of action, shows the difference between a legal duty and a moral duty. A legal duty may be a moral duty backed by law, or may be imposed apart from any moral duty and involve no

56. Cockburn, C. J. in *Scaramanga v. Stamp*, 5 C.P.D. 295, 304-305 (1880).

57. *Pennsylvania R. Co. v. Roney*, 89 Ind. 453 (1883); *Eckert v. Long Island R. Co.* 43 N.Y. 502 (1871); *Gibney v. State*, 137 N.Y. 1, 133 N.E. 142, 19 L.R.A. 365 (1893); *Cottrill v. Chicago, M. & St. P. R. Co.*, 47 Wis. 634, 3 N.W. 376 (1879); *Brandon v. Osborne, Garrett & Co.*, [1924] 1 K.B. 548.

58. *Wagner v. International R. Co.*, 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1 (1921).

59. *Ambrose v. Kerrison*, 10 C.B. 776 (1851); *Bradshaw v. Beard*, 12 C.B. N.S. 344 (1862); *Patterson v. Patterson*, 59 N.Y. 574 (1875).

60. See also *Burnand v. Rodocanachi*, 5 C.P.D. 424, 427 (1880) where Lord Coleridge, C. J. says: "But it seems to be equally clear, as the result of great authorities both in England and in America, that, if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects as are morally entitled to share in the fund, then what their subjects so recover they recover as a right not perhaps enforceable by law, but yet with such a character of moral equity about it as makes them in respect of what they so recover trustees for those who in equity and justice are entitled to it."

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moral quality beyond moral obligation to abide the rule of law. But the law may recognize a moral duty as such and attach legal consequences to performance of it without making it a legal duty to do what the moral duty requires. The classical example of a legal duty where there was no moral duty is *Rex v. Bailey*.⁶¹ In that case a statute took effect and an act in contravention of it was done while a sailing ship was off the coast of Africa and no one on board could have known of the statute by any means of communication possible at that time. The court felt bound to convict, but the judges recommended a pardon, which was granted.

4. *Duty and liability.* Three types of case may be distinguished. In one there is what Austin would call a relative duty, a duty correlative to a legal right in the stricter sense. Here breach of the duty is actionable of itself without the need of showing any injury beyond infringement of the right. Such cases are non-payment of a debt or of a sum of money due on a common-law or a mercantile specialty, failure to make restitution due in a case of unjust enrichment at another's expense, failure to restore a unique chattel one has converted, retention of possession of land by a disseisor, trespass on land, assault, intentional battery, and wrongful exercise of dominion over another's chattel. In a second type there is what is better called liability. One falls short of the standard of

61. Russ. & Ry. 1 (1800).

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conduct established by law and is liable to repair any resulting injury. He creates an unreasonable risk of injury to others. Others within the ambit of the risk may sue to recover for injury to person or property which has accrued to them, but only to exact reparation of the injury. Thus where there has been a negligent battery (in the technical sense of the latter term) as compared with an assault or an intentional battery, no action can be maintained unless injury can be shown.⁶² In the third type of case there is what Austin calls an absolute duty. The law forbids certain acts which threaten the general security. Those who do them may be prosecuted without regard to whether any one has actually been injured. Thus although reckless driving which injures no one gives rise to no civil action, one may be prosecuted for reckless driving so as to endanger others even if he succeeds in so doing without injury to any one. Also the grossest misrepresentation of fact is not actionable unless injury resulted.⁶³ But an unsuccessful attempt to obtain money or property by false pretences may be prosecuted.

62. "But if no injury was caused . . . to the plaintiff, if he suffered no damage whatever from the defendant's negligence, then he would not be able to recover." Sheldon, J. in *Sullivan v. Old Colony St. R.*, 200 Mass. 303, 307-308, 86 N.E. 511, 512 (1908). "The mere negligent driving of itself, if accompanied by no injury to the plaintiff, was not actionable at all." Bowen, L. J. in *Brunsdon v. Humphrey*, 14 Q.B.D. 141, 150-151, [1884]. See also *Commercial Bank v. Ten Eyck*, 48 N.Y. 305, 308, 311 (1872).

63. *Bally v. Merrell*, 3 Bulstr. 94, 95 (1616); *Freeman v. McDaniel*, 23 Ga. 354, 355 (1857); *Taylor v. Guest*, 58 N.Y. 262, 266 (1874); *Nye v. Merriam*, 35 Vt. 438, 445 (1862).

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That this distinction between duty and liability is practically significant is brought out by the difficulties which have been encountered in use of the phrase "duty of care" to explain the ambit of the unreasonable risk cast on others where there has been departure from the standard of due care.⁶⁴ Holmes long ago pointed out that "duty of care" tells us nothing not already involved in the idea of negligence.⁶⁵

5. *Nature and classification of legal duties.* Although it is commonly said that duty is the correlative of right, if we differentiate legal right in the stricter sense from interest, secured interest, power, and liberty, we must say that legal duty is the correlative of legal right in the stricter sense. An owner's liberties of using and of enjoying are not directly made effective by legal duties. The owner sues for an infringement of his right of possession or of his right of excluding, or for infringement of his right to the integrity of his physical person while he is asserting his liberties, not for infringement of his liberties as such. But is legal duty the only correlative of legal right in the stricter sense? Corresponding to the owner's right against every one of excluding others

64. Lord Wright, *Legal Essays and Addresses* (1928) 112-123, 363, 404-406; Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580-584; Andrews, J. in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 349, 354-356, 162 N.E. 99, 102, 104-105, 59 A.L.R. 1253 (1928). Cf. Lord Macmillan in *Donoghue v. Stevenson*, at pp. 618-619.

65. *The Path of the Law* (1897) 10 Harv.L.Rev. 457, 472, reprinted in Holmes, *Collected Legal Papers* (1920) 167, 190-191.

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from his land, it is the duty of every one to keep off. The trespasser may be sued for breach of this duty. Suppose, however, another's cattle trespass. Shall we say the latter is under a legal duty of keeping them off? What must give us pause about putting it in this way is that the owner of the cattle is liable for damage done by them even though they were turned loose by a wrongdoer.⁶⁶ It is even less happy to speak of a duty where there is liability under the doctrine of *Rylands v. Fletcher*.⁶⁷ Unless we feel bound to an idea of one necessary opposite and one necessary correlative to each juristic conception, there is no reason why we should not recognize that there may be a liability where there is no legal duty. Where statutes make the owner of a car who has lent it to a neighbor liable for the negligence of the borrower,⁶⁸ if we think of "duty of care" we should say the borrower has the duty and the owner is under a liability. But why not say each is under a liability? There is coming to be an increasing number of such cases.

Bentham, although he did not put it in that way, made what amounts to a distinction between duties which give effect to social interests directly as such, and those which secure them indirectly through immediately secur-

66. *Noyes v. Colby*, 30 N.H. 143 (1885); *Tonawanda R. Co. v. Munger*, 5 Denio (N.Y.) 255, 267-268 (1848); *Morgan v. Hudnell*, 52 Ohio St. 552, 40 N.E. 716, 27 L.R.A. 862 (1885).

67. L.R. 3 H. of L. 330 (1868).

68. Conn. Public Acts, 1917, chap. 305, § 6.

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ing individual interests.⁶⁹ He called the first "absolute duties" and the second "duties of the relative kind."⁷⁰ Austin developed this distinction. He says: ". . . duties may be distinguished into relative and absolute. A relative duty is incumbent upon one party, and correlates with a right residing in another party. In other words, a relative duty answers to a right; or implies and is implied by a right. Where a duty is absolute, there is no right with which it correlates. There is no right to which it answers. It neither implies, nor is implied by a right."⁷¹ But his distinction is impaired by his making the idea of duty cover too much, and by not distinguishing duties imposed to secure public interests and those imposed to secure social interests. In the former, we have to do with the state as a juristic person which may fairly be said to have rights to which there are correlative duties. In the latter, we have to do with the state as the guardian of social interests, and to this capacity legal rights in the narrower sense are not attributable. Under a statute against cruelty to animals it cannot be said that rights are conferred upon the animals.⁷² If one in-

69. *Principles of Morals and Legislation* (1875), reprint of New Edition 1823, 258, 290.

70. *Ibid.* 290.

71. 1 *Jurisprudence* (5 ed. 1885) 401; see also *ibid.* 406.

72. It is true Lorimer argues that animals have rights. *Institutes of Law* (2 ed. 1880) 218. But he is speaking of "natural rights." Unless one adheres to the doctrine that "natural" rights as such are necessarily legal rights he need not take this seriously.

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injures a horse belonging to the state or one belonging to his neighbor, he infringes a secured interest of substance of the state as a juristic person or of the neighbor, and an action will lie for trespass. If he cruelly injures his own horse there may be a prosecution under the statute. If he so injures the horse of the state or of another individual, there may be in addition to and wholly independent of the action of trespass a prosecution under the statute. In the one case an individual or a public interest of substance is secured; in the other a social interest in the general morals.

Later writers on analytical jurisprudence have generally rejected Austin's classification.⁷³ Holland's chief objection is to Austin's proposition that absolute duties are sanctioned criminally and do not correspond with rights in the sovereign nor with rights at all.⁷⁴ Holland asserts that "the sovereign may be clothed with a right."⁷⁵ This is true enough when we are speaking of interests of substance of the state as a juristic person, as when the United States bring ejectment against one who occupies without right a parcel of the public domain. But if there is a prosecution for using the mails to defraud we have another situation to which Austin's proposition is applicable. Holland vouches also claims against the Crown heard on petition of right, or in the United States in a Court of Claims, as showing

73. Holland, *Elements of Jurisprudence* (13 ed. 1924) 131-132; Pollock, *First Book of Jurisprudence* (6 ed. 1929) 63-65; Salmond, *Jurisprudence* (9 ed. 1937) 291-292; Gray, *Nature and Sources of the Law* (2 ed. 1921) 12; Keeton, *The Elementary Principles of Jurisprudence* (1930) 98-99; Paton, *Jurisprudence* (1946) 217-220. But Hibbert, *Jurisprudence* (1932) 179-180, follows Austin, and Allen, *Legal Duties* (1931) 184-186, argues for Austin's absolute duties.

74. *Jurisprudence* (5 ed. 1885) 406.

75. *Elements of Jurisprudence* (13 ed. 1924) 132.

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that the state may have legal duties. Here, again, we must distinguish between public and social interests, and so between the state as a juristic person with interests of substance, making contracts and owning property, and the state as the political organization of a society and guardian of social interests. Salmond considers that "all duties toward the public correspond to rights vested in the public and a public wrong is necessarily the violation of a public right."⁷⁶ To Salmond, a right is "an interest recognized and protected by a rule of law."⁷⁷ Hence if a breach of a duty must "necessarily" be a violation of a right there must be a right as the basis of criminal prosecution no less than as the basis of a civil action. But if we define right more narrowly and do not concede the necessary relation of breach of duty to a right, the criticism fails. Keeton, following Holland, objects to Austin's four categories of absolute duties, three of which are not necessary to maintain his classification and may very well be left out of account. He properly criticizes them and then lays down that "duties owed to the state . . . correspond to rights vested in the state." Thus in any criminal prosecution the state is enforcing its own rights against the offender.⁷⁸ Paton also reviews Austin's four categories of absolute duties but objects specially to the proposition that "there cannot be a right-duty relationship between the subject and the state."⁷⁹ Here, again, it is necessary to distinguish the two aspects of the state. Allen, defining legal right more narrowly as we have learned to do since Hohfeld, holds that the duties imposed by criminal law have no true counterpart in legal right.⁸⁰ His argument and Hibbert's⁸¹

76. *Jurisprudence* (9 ed. 1937) 292.

77. *Ibid.* 287.

78. *Elementary Principles of Jurisprudence* (1930) 98-99 (2 ed. 1951) 134-135.

79. *Jurisprudence* (1946) 217, 219.

80. *Legal Duties* (1930) 184.

81. *Jurisprudence* (1932) 184-185.

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seem to me well taken. Critics of Austin proceed on a broader and undifferentiated idea of a legal right and with that idea in mind are affected by a feeling of the necessity for a right wherever there is a duty. They are also affected in considering the sound and useful part of Austin's doctrine, by the unnecessary categories of absolute duties which he brings in because of his desire to treat of "duty" in all its meanings instead of confining himself to legal duty in the stricter sense. Austin's distinction is not only logically maintained from the standpoint of the theory of interests, but is practically useful. Few things give the teacher of law more trouble at the outset than the layman's persistent thinking of law in terms of the criminal law. Treating a criminal prosecution as enforcement of a right of the state makes it more difficult to teach that a civil action is not a proceeding to punish but instead one to repair.⁸²

6. *Liabilities.* Liability is used here for a situation where as a consequence of conduct which does not conform to an established legal standard or of some enterprise or activity he carries on in which others are employed or things are maintained which are likely to get out of hand and do damage, one will be held to make reparation if damage results. As legal duty means subjection to some act or forbearance imposed by law, liability, in the sense in which the term is used here, means a risk of having to repair injury where the law imposes a risk without enjoining a duty.⁸³ "Liability" is used also both

82. See Cooley, *Treatise on the Law of Torts* (2 ed. 1888) *53-*54. Hilbert's remarks on the utility of Austin's distinction deserve to be noted. *Ibid.* 185.

83. See references *supra*, notes 64-65.

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in a wider and in a narrower sense.⁸⁴ In the widest sense it covers all situations where one may be held in any sort of legal proceeding. Thus we speak of criminal liability. If one acts counter to a section of the penal code he risks prosecution. Indeed, the threat theory of law makes liability in this sense a primary idea in jurisprudence. In a very narrow sense Hohfeld uses the term to mean risk of having a power exercised either at one's expense or even to his advantage.⁸⁵ Hence one cannot classify a Hohfeldian liability as a disadvantage along with duty, disability and inability as Kocourek does.⁸⁶

In *Fletcher v. Rylands*⁸⁷ liability without fault was said to be an "absolute duty" to restrain what one brings or maintains on his land. But, as has been suggested above, there is no duty to prevent cattle from trespassing without the owner's fault; there is no duty in a common carrier to prevent goods bailed to him from being stolen or lost without his negligence; there is no duty to prevent a servant from committing torts in the course of his employment. "The true situation seems to be that he who maintains for his own advantage a peculiarly dangerous thing in proximity to others necessarily imposes on those others a risk of injury ... greater than is to be reasonably expected in the ordinary circumstances of social life; and it is therefore just and expedient that he himself should bear the risk of making good

84. For meanings of the term see Miller, *The Data of Jurisprudence* (1903) 165-168.

85. *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 50-60. As to advantage here, see note 90 on p. 60.

86. *Jural Relations* (1927) 78.

87. *L.R. 2 Ex. 265, 279* (1866).

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any damage to others which results from maintenance of the object.”⁸⁸ This is liability, not duty. If one carries on an enterprise by servants or agents he subjects others to a risk that these persons from whom reparation usually cannot be had will so conduct it as to do injury to others. Hence the common law subjects the employer to liability. Also an employer is made liable under the Workmen’s Compensation Acts for injury to another employee without the employer’s fault, without the latter being under any duty to prevent it. The fallacy in the dissenting opinion of McKenna, J., in the *Arizona Employers’ Liability Cases*⁸⁹ is in confusing liability with absolute duty and treating it as punishment. There may be risk of repairing damage when there is no duty of acting or forbearing.

There are so many current uses of the term “liability” that one is tempted to seek some other word. But I doubt whether the advantage gained by neologisms suffices to justify the trouble of learning and remembering them. The context will usually show sufficiently the sense in which the familiar term is used. Bentham’s experiments in the quest of a terminology in which each word is to have one exact meaning are a warning.

88. Allen, *Legal Duties* (1931) 194.

89. 250 U.S. 400, 434-440, 39 S.Ct. 553, 561-563, 63 L.Ed. 1058, 6 A.L.R. 1537 (1919). As to liabilities of those engaged in public callings, see Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 57.

Chapter 25

Persons

- § 124. Legal Units.
- § 125. Status and Capacity.
- § 126. Attributes of Legal Personality.
- § 127. Beginning and Termination of Legal Personality.

Chapter 25

Persons

Section 124



LEGAL UNITS. 1. *In general.*¹ One mode of securing interests is to recognize or establish or allow establishment of certain entities to which rights in the wider sense are attributed; or on which legal rights, powers, and privileges are conferred; in which liberties are recognized, and upon which duties and liabilities are imposed. These entities have been known in the science of law, if not from antiquity certainly in the modern world, by the name of persons, and have been said to be “subjects of right and

1. On the older idea of “subjects of rights and law” or of rights, “holders” or “bearers” of rights, or “enjoyers of rights”: Gray, *Nature and Sources of the Law* (1909) §§ 63–148 (2 ed. 1921) 27–64; Salmond, *Jurisprudence* (9 ed. 1937) §§ 109–114; Korkunov, *General Theory of Law* (transl. by Hastings, 1909, 2 ed. 1922) § 28; Pollock, *First Book of Jurisprudence* (6 ed. 1929) 111–129; Duguit in *Progress of Continental Law in the Nineteenth Century* (Continental Legal History Series, vol. XI, 1918, pp. 87–100); Kocourek, *Jural Relations* (1927) chap. 17; Kelsen, *The Pure Theory of Law* (1934) 50 *Law Quart.Rev.* 474, 496–498; Paton, *Text-Book of Jurisprudence* (2 ed. 1949) 149–171; Stone, *The Province and Function of Law* (1946) 102–103; Demogue, *Notions fondamentales du droit privé* (1911) 320–382; 1 Bierling, *Juristische Prinzipienlehre* (1894) § 13; 2 Bierling, *Kritik der juristischen Grundbegriffe* (1883) 74–85; Somló, *Juristische Grundlehre* (1917) §§ 139–143; 1 Windscheid, *Pandekten* (9 ed. 1906) § 49; Miller, *Lectures on the Philosophy of Law* (1884) lect. 11; Lasson, *System der Rechtsphilosophie* (1882) § 41; Binder, *Philosophie des Rechts* (1925) § 15; 2 Roguin, *La science juridique pure* (1932) §§ 660–799.

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law" or "subjects of rights" or "holders" or "bearers" of rights or "enjoyers" of rights. For more than a generation in my lectures I have spoken of them as "legal units"—the units of the legal order as human individuals are the units of the social order. They are units on behalf or in title of which legally recognized and secured interests are asserted. Entities with a *de facto* existence, or such as the law allows to be set up for economic or social purposes, as well as individual human beings, may be recognized or interests asserted in title of them may be secured in varying degrees.

For a long time we thought of these legal units in terms of individual human beings. Politically organized societies, the state and municipalities, groups and associations, incorporated enterprises, and in Continental Europe foundations, were treated as analogous to the individual human being as the real legal person. The influence of natural-law thinking had much to do with this. In civilized lands even in the modern world it has happened that all human beings were not legal persons. In Roman law down to the constitution of Antoninus Pius the slave was not a person. "He enjoyed neither rights of family nor rights of patrimony. He was a thing, and as such, like animals, could be the object of rights of property."² The constitution of Antoninus Pius conferred on the slave a legal power of bringing about a proceeding

2. Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 134.

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to determine whether he was cruelly treated (without, however, thereby obtaining freedom) and thus recognized a partial legal personality.³ In the French colonies, before slavery was there abolished, slaves were "put in the class of legal persons by the statute of April 23, 1833" and obtained a "somewhat extended juridical capacity" by a statute of 1845.⁴ In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights. They were not property. But they could scarcely be called legal persons.⁵ At common law there was civil death—loss of legal personality in one naturally alive.⁶ It was known also to the Roman strict law,⁷ obtained in French law till 1854,⁸ and is provided for life convicts by statute in some of the United States.⁹

But there came to be a steady expansion of legal personality, a recognition of the human being as a moral and so a legal unit and extension of legal capacity, so that

3. Inst. 1, 8, 2.

4. Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 134.

5. Cobb, *Inquiry into the Law of Negro Slavery* (1858) §§ 383-388; Taney, C.J. in *Dred Scott v. Sandford*, 19 How. 393, 403-427 (1857). Cobb (§ 387) says that the free negro in the slave states was "but little above the slave as to civil privileges."

6. 1 Blackstone, *Commentaries* (1765) 132.

7. Sohm, *Institutes of Roman Law* (Liedlie's transl. 3 ed. 1905) § 35.

8. French Civil Code (1804) art. 25, repealed 1854. See Savigny, *Jural Relations* (transl. by Rattigan, 1884) 112.

9. In *re Nerac*, 35 Cal. 392 (1868); *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148, 1 L.R.A. 264 (1888).

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in the era of natural law legal personality was thought of as an attribute of the individual human being. The human being had certain qualities whereby he was morally entitled to have certain things and do certain things and so was the subject of natural and therefore legal rights. With the natural-law basis eliminated, there remained for analytical jurisprudence the definition: "A subject of legal rights and duties."¹⁰

Recently the terms "subject of rights," or "holder" or "bearer of rights" and the like have been objected to both by those who deny there are rights and by others who consider that they lead to needless philosophical problems, involved even more in the term "person," which after generations of discussion continue greatly to embarrass jurisprudence.¹¹

In the nineteenth century it was held that will was the essence of legal personality. Gray in 1909 accepted that proposition. He says: ". . . a legal duty does not imply any exercise of the will on the part of the one subject to the duty, and, therefore, for the existence of a legal duty the person bound need not have a will; but in order that a legal right be exercised a will is necessary, and, therefore, so far as the exercise of legal rights is concerned, a person must have a will."¹² Hegel says

10. Gray, *Nature and Sources of the Law* (2 ed. 1921) 27.

11. "The concept of human personality is difficult to define and has been a storm center of intellectual controversy, and many of these problems have been transferred to the legal domain." Paton, *Jurisprudence* (1946) 250 (2 ed. 1951) 314-315.

12. Gray, *Nature and Sources of the Law* (1 ed. 1909) § 65 (2 ed. 1921) 27.

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that personality is "the subjective possibility of a rightful will."¹³ Zitelmann defines personality as "the legal capacity of will."¹⁴ The ethical natural law of the seventeenth and eighteenth centuries and the metaphysical jurisprudence of the nineteenth century led to such a doctrine. But it began to be attacked already in the last century. Historically the kin group was an earlier legal unit, certainly an earlier unit of organized social control. Also analytical jurisprudence has had to take account of idiots, unborn children, babes in arms, in Roman law, children under seven years, and those lunatics whose mental disease inhibits exercise of will. All of these are commonly accounted natural persons and certainly would today be legal persons. Then, too, there is the state, and there are municipalities, ecclesiastical organizations, associations, business and industrial and public service companies, and in many countries foundations, to which the law attributes capacity for rights in the wider sense in greater or less measure. The will theory has to treat of all these by means of a fiction. Nékám argues for giving up the term "legal personality" and saying instead "legal entity."¹⁵ As said above, I have been in the habit of using "legal unit." But the terms person and personality have been used so long and are in such general use in connection with legal units that probably we can do no more than note the difficulties and pitfalls which come in

13. Grundlinien der Philosophie des Rechts (1821) §§ 34-35.

14. Begriff und Wesen der sogenannten juristischen Personen (1873) 68. See also: "The juristic conception of the juristic person is exhausted in the will, and the so-called physical persons are for the law only juristic persons with a physical *superfluum*." Meurer, Der Begriff der heiligen Sachen (1885) § 10, p. 74. There is a good discussion of this doctrine in Karlowa, Zur Lehre von den juristischen Personen, 15 Grünhut, Zeitschrift für das Privat- und öffentliche Recht der Gegenwart (1888) 381-383. His striking formulation of it (p. 383) is translated and adopted by Gray, Nature and Sources of the Law (2 ed. 1921) 28.

15. Nékám, The Personality Conception of the Legal Entity (1938) 48-49, 110, 120, 121.

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their train in the different connections in which we seem obliged to use them.

2. "*Natural*" persons.¹⁶ The ideas of "person" and "personality" have made no serious difficulties as to the normal individual human being. Nor does the normal individual human being make any difficulties for the will theory. Such beings may exercise their rights (in the wider sense) by themselves or through agents. In Anglo-American law, though not in Roman law, they may leave it to an agent whether their rights or some of them shall be exercised at all. But whether they are exercised by the person entitled or by his agent, the ultimate basis of securing the protected interest may be said to be the will of the holder of the right. But some human beings are devoid of will and as to others the amount or potentiality of will is so slight that for practical purposes it may be ignored. In these cases, if will is taken to be an essential element of personality, we should have to say that an element of legal personality is a legal will, a will attributed to the person but exercised for him by a committee or a guardian. There is an analogy in the case of persons possessed of natural will but who, being lacking in judgment, are not permitted to exercise that natural will for all purposes or on all occasions. For example, a young

16. Holland, *Jurisprudence* (13 ed. 1924) 93-97; Markby, *Elements of Law* (6 ed. 1905) §§ 131-135; Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 133-192; 1 Dernburg, *Pandekten* (8 ed. 1911) § 50; Stark, *Die Analyse des Rechts* (1916) 236-269.

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man just under age cannot bring an action to recover for an injury. A guardian or next friend exercises will for him and that will is attributed to him. Gray, who accepts the will theory, speaks of this as a dogmatic fiction.¹⁷ When a normal person exercises rights through an agent to whom by a legal transaction he has delegated a power of representing him in will there is no fiction. The will of the holder of the right is exercised by one to whom he has given the power. When, however, one who can neither exercise a will of his own nor appoint another to exercise his will for him, has some one designated by law to exercise a will which the law attributes to him, as the results are the same as where a normal person either asserts his rights by exercise of his own will or by empowering another to represent him in exercise of it, the fiction is a convenient way of expressing the legal position for practical purposes. The significant feature of legal personality is capacity for rights. In consequence, apart from the characteristic tendency of jurisprudence in the nineteenth century to make will the central point, insistence on will in connection with legal personality has behind it consideration that there is no legal compulsion to enforce one's rights as such. Exercise of free will to give it effect is involved in the idea of a right in the wider sense. It is sometimes, as in case of fiduciary relations, a legal duty of the person of inherence of a legal right

17. Gray, *Nature and Sources of the Law* (2 ed. 1921) 30.

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toward a third person to enforce the right against the person of incidence. But there is never such a duty toward the person of incidence. "It is of the nature of a man's right, as such, that to seek or to abstain from seeking the aid of society for the protection of his interest is a matter of his own free will."¹⁸

Philosophical and psychological theories of personality and a theory of will as involved in the very idea of a right, and so of a legal person as one entitled to at least some measure of rights in the wider sense, have served well enough in the case of the ordinary "natural person" and could be made to serve for the idiot, the victim of dementia, and the parietic, with the aid of a dogmatic fiction, which imposed no great strain upon us. But attributing of secured interests and so of legal personality to an unborn child¹⁹ and even more "juristic personality," attributing legal personality to associations, business devices, masses of property, foundations (in the technical sense of the civil law) and in India to idols, and problems as to recovery in cases of death by wrongful act,²⁰ have tried the saving dogmatic fiction to the limit so that the nature of a juristic person became one of the most vexed questions of the science of law.²¹ One may

18. Ibid. 26.

19. See *post*, § 127.

20. See *ibid*.

21. See Radin, *The Endless Problem of Corporate Personality* (1932) 32 Columbia Law Rev. 643.

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question, however, whether the question is so difficult as it has been made to appear. Philosophical and psychological theories of "person" and "personality" and philosophical theories of the human will as a necessary element of a legal right and so of a legal person as an entity with capacity for rights, have compelled modes of thinking in terms of human personality instead of in terms of legal units. The idea of a fiction coupled with a jealousy of associations and thinking in terms of tolerated associations not merely as recognized but as created by the state, have led to fiction and concession theories of the juristic person, on the one hand, sometimes to extravagant development of an organism theory, on the other hand, and to unfortunate misunderstanding of the sociological theory by American lawyers, thinking of all juristic persons in terms of the incorporated business company. One is tempted to say about the problem of juristic personality what Austin said of the long discussed question of the nature of *status*.²² But, if nothing more, the very bulk of juristic writing on the subject, the multiplicity of theories, the heat engendered in debate, and the general belief that there is a problem of the first magnitude, indicate a "laborious inquiry" such as Austin devoted to *status*.

22. [After a terse statement in seven lines]: "And this it appears to me is the whole rationale of the matter. Though, such is the pother made about *status*, that nothing but a most laborious inquiry into the subject could convince me that there was not more to it." 2 Austin, *Jurisprudence* (5 ed. 1885) 722.

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3. *Juristic persons.*²³ (1) *Kinds of juristic legal units.* At one time or place and another the greatest variety of things have

23. Salmond, *Jurisprudence* (9 ed. 1937) §§ 115–120; Holland, *Jurisprudence* (13 ed. 1924) 97–100; Markby, *Elements of Law* (6 ed. 1905) 136–145; Gierke, *Political Theories of the Middle Age*, Maitland's introduction (1900) xviii–xlili; Maitland, *Moral Personality and Legal Personality*, 3 *Collected Papers* (1911) 304; Gareis, *Science of Law* (transl. by Kocourek, 1911) 104–106; Machen, *Corporate Personality* (1910) 24 *Harv.L.Rev.* 253, 347; Freund, *The Legal Nature of Corporations* (1897); Laski, *The Personality of Associations* (1916) 29 *Harvard Law Rev.* 404; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 197–202; Warren, *Corporate Advantages Without Incorporation* (1929); Duff, *Personality in Roman Private Law* (1938); Nékám, *The Personality Conception of the Legal Entity* (1938); Dewey, *The Historic Background of Legal Personality* (1926) 35 *Yale Law Journ.* 655; Vinogradoff, *Juridical Persons* (1924) 24 *Columbia L.Rev.* 594; Geldart, *Legal Personality* (1911) 27 *Law Quart.Rev.* 90; Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 *Columbia Law Rev.* 128; Smith, *Legal Personality* (1927) 37 *Yale Law Journ.* 283; Radin, *A Restatement of Hohfeld* (1938) 51 *Harvard Law Rev.* 1141, 1160–1162; Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 *Harvard Law Rev.* 977; Radin, *The Endless Problem of Corporate Personality* (1932) 32 *Columbia Law Rev.* 643; Latty, *The Corporate Entity as a Solvent of Legal Problems* (1936) 34 *Mich.Law Rev.* 597; Hallis, *Corporate Personality* (1930); Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494; Foley, *Incorporation, Multiple Incorporation, and the Conflict of Laws* (1929) 42 *Harvard Law Rev.* 516; Friedmann, *Legal Theory* (2 ed. 1947) 165–168, 371–384.

1 Gierke, *Deutsches Genossenschaftsrecht* (1868); Gierke, *Das Wesen der menschlichen Verbände* (1902) 33–34; id. *Die Grundbegriffe des Staatsrecht und die neuesten Staatsrechtstheorien* (1874) 30 *Zeitschrift für die gesamte Staatswissenschaft* 304 (unchanged reprint pub. by Mohr, Tübingen, 1915); 2 Bierling, *Kritik der juristischen Grundbegriffe* (1877) 85–118; Zitelmann, *Begriff und Wesen der sogenannten juristischen Personen* (1873); Hölder, *Natürliche und juristische Personen* (1905); Binder, *Das Problem der juristischen Persönlichkeit* (1907); Rümelin, *Methodisches über juristisches Personen* (1891); Meuer, *Die juristischen Personen nach deutschem Reichsrecht* (1901); id. *Der Begriff und Eigenthümer der heiligen Sachen* (1885); Karlowa, *Zur Lehre von den juristischen Personen* (1888) 15 *Grünhut, Zeitschrift für das Privat- und öffentliche Recht der Gegenwart*, 381; Haff, *Institutionen der Persönlichkeitslehre und des körperschaftsrechts* (1918); Stark, *Die Analyse des Rechts* (1916) 270–310; 1 Dernburg, *Pandekten* (8 ed. 1911) §§ 47–50; 1 Windscheid, *Pandekten* (9 ed. 1906) § 5; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1905) 131; 1 Schnorr von Carolsfeld, *Geschichte der juristischen*

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been recognized by the law as having in greater or less degree capacity for legal rights. In the Middle Ages, God or Saints were often recognized as legal units.²⁴ In Roman law, certain of the gods, by virtue of resolves of the Senate or constitutions of emperors, could be instituted as heirs.²⁵ In such cases Gray considers there is no need of invoking a fiction. To a society which accepts the existence of gods, attributing legal rights to them and attributing authority to represent them to their priests is only recognition of what are taken to be facts of revealed religion. "The society is dealing with what it believes to be a reality, just as much as when it is dealing with human beings; it is not pretending that that is true which it knows or believes not to be true."²⁶ When, however, legal rights are attributed to an idol²⁷ and the Judicial Committee of the Privy Council can tell us that "the will of the idol in regard to location must be re-

Person (1933); 1 Wolff, *Organschaft und juristische Person* (1933) 1-231; Rhode *Juristische Person und Treuhand* (1932); Kronstein, *Die abhängige juristische Person* (1931).

Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923); Vareilles-Sommières, *Les Personnes morales* (1902); Jossierand, *Essai sur la propriété collective* (1904) 1 *Livre du centenaire du code civil français*, 357; Saleilles, *De la personnalité juridique: histoire et théorie* (2 ed. 1922); 1 Michoud, *Théorie de la personnalité morale* (2 ed. 1922) nos. 1-74; Lévi, *La société et l'ordre juridique* (1910) 245-343; 4 Bonnecase, *Supplement to Baudry-Lacantinerie, Traité de droit civil* (1925) 34 ff.; Clément, *Personnalité morale et personnalité technique* (1935); Ferrara, *Teoria delle persone giuridiche* (1924).

24. 2 Gierke, *Deutsche Genossenschaftsrecht* (1873) 527 ff.

25. The Rules of Ulpian (xxii, 6) name Tarpeian Jupiter, Didymaeon Apollo of Miletus, Mars in Gaul, Minerva of Ilium, Hercules of Gides, Diana of Ephesus, the Siplyenian Mother of the Gods, worshiped at Smyrna, and Selene Caelestis, the goddess of Carthage. It will be noticed that a particular temple is named in each case except Mars in Gaul. See 1 Pernice, *Labeo* (1873) 260-263.

26. Gray, *The Nature and Sources of the Law* (2 ed. 1921) 39-48.

27. *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, L.R. 52 Ind. App. 245 (1925).

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spected”²⁸ and can appoint a “disinterested next friend” to represent it in court,²⁹ we may perhaps feel justified in looking at the matter, if not *sub specie aeternitatis*, at any rate with the eyes of the general juristic world, and wonder at the relativism which can see reality here but only fiction in an incorporated religious association of human beings.

Secured interests are also attributed to an unborn child where it is for the benefit of the child when born to be considered as having had capacity for rights before birth.³⁰ Also it has been argued that in some cases of killing by wrongful act³¹ and of liability for defamation in a will³² a deceased person is taken to have a continuing legal personality after death.

Attributing of legal personality to animals is an old story in legal history.³³ Gray considers that there was no conscious fiction in attributing rights and duties to them. As to duties, the fiction would be in assuming “capacity to receive commands directed to them.” But it was believed that the delinquent animals knew they were disobeying the law.³⁴ In much the same way inanimate things may be regarded as having rights and entitled to sue in the courts,³⁵ and they have at times been thought of

28. Ibid. 259.

29. Ibid. 261. See also *Greedharreejee v. Rumanlolljee*, L.R. 16 Ind.App. 137 (1889).

30. See *infra*, § 127.

31. See *ibid*.

32. Ibid.

33. Genesis, ix, 5; Exodus, xxi, 28; Plato, *Laws*, ix, 12; Amlra, *Thierstrafen und Thierprocesse* (1891) 6, 15 n. 5; Evans, *Prosecution and Capital Punishment of Animals* (2 ed. 1906) 46-49.

34. Gray, *Nature and Sources of the Law* (2 ed. 1921) 43. See Holmes, *The Common Law* (1881) 7, 8.

35. Gierke gives examples of this in Germanic law in the middle ages. 2 *Deutsche Genossenschaftsrecht* (1873) 542-546.

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as subjects of legal duties.³⁶ In admiralty a ship may be sued, may be held at fault for a collision, and may have a judgment rendered against it.³⁷ Also in prize proceedings and forfeiture proceedings under revenue laws, pure food laws, statutes as to intoxicating liquor, narcotics, gambling, exportation of war materials during the war, and the like there is in form a proceeding directly against the property itself.³⁸ Indeed, under statutes for condemnation of land for public use the proceeding may at least in form be directly against the tract itself.³⁹ In the case of proceeding against a ship for fault in a collision there is a straight line of descent from the liability of anything which caused injury which is general in the beginnings of law. The other cases seem to have grown up on the analogy of admiralty. But we may query whether in the forfeiture cases the law really treats the thing as a juristic person. Suing an automobile, or specified number of kegs of whiskey carried into dry territory, or a lot of smuggled goods is an accommodating to the exigencies of legal procedure of a proceeding to cut off all claims to the *res*. To do this does not personify the automobile or the whiskey or the smuggled goods. The smuggled goods are under no duty to pay

36. Demosthenes, *Against Aristocrates*, § 18; Holmes, *The Common Law* (1881) 7. S. Something of this survived to modern times in the deodand. The thing which had been the instrument of killing a man was forfeited to the Crown. 1 Blackstone, *Commentaries* (1765) 300. This reached absurdity when a railroad engine which had killed a man by explosion of a boiler was forfeited. *Queen v. Eastern Counties R. Co.*, 10 M. & W. 58 (1842). Deodands were soon after abolished. 9 & 10 Vict. c. 62 (1847).

37. This is well treated of in Holmes, *The Common Law* (1881) 26-30.

38. E. g. *The Schooner Adeline and Cargo*, 9 Cranch, (U.S.) 244, 3 L.Ed. 719 (1815); *United States v. One Ford Coupe Automobile*, 54 F.Supp. 852 (D.C.Tex.1944); *U. S. v. 62 Packages of Tablets*, 142 F.2d 107 (C.C.A.7th, 1944); *U. S. v. One 1941 Cadillac Sedan*, 145 F.2d 296 (C.C.A.7th, 1944).

39. E. g. *United States v. Entire Fifth Floor in Butterick Building, Borough of Manhattan, City of New York*, 54 F.Supp. 258 (D.C.N.Y.1944); *United States v. 340 Acres of Land in Richmond County, Georgia*, 54 F.Supp. 457 (D.C.Ga.1944).

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the customs dues. The duty is on the importer. When under statutes one sues the "unknown heirs" of X to quiet the title to Blackacre, the law does not treat the unknown heirs of X as a juristic person nor personify Blackacre. There is a notification to the unknown heirs of X to come in or their claims will be barred and the form of the proceeding is adapted to the ordinary suit in equity to quiet title as against the claims of X. The most that can be said as to these cases of suits against inanimate things is that duties or liabilities may be imposed on them but legal rights are not conferred upon them.

Another case is personification of the estate of a deceased. Technically there is no such thing in Anglo-American law. But although strictly the title of a case may be X, Administrator of A, v. Y, Administrator of B, or X, Administrator of A, v. B, we say habitually and most reporters print, Estate of A v. Estate of B, or Estate of A v. B. After all we feel that the estate is something more than an abstract idea. In Roman law, where there was no *heres necessarius*, on whom the estate devolved immediately and necessarily, there would be an interval between death and the entry of an heir. In such case there was an incomplete personification of the *hereditas* (*hereditas iacens*).⁴⁰ The Roman jurists did not speak of a fictitious person as the medieval jurists did. None of the texts go so far as to call the *hereditas* a person and in the Institutes we are told it is not.⁴¹ Usually it is said that the *hereditas* is held or takes the place of an owner⁴² or maintains the place of a person. But it is said in some texts to be the owner of the property.⁴³ The idea of personification is thought to

40. The texts are collected and discussed in Duff, *Personality in Roman Law* (1938) 19-20, 162-167.

41. Inst. 3, 17, pr.

42. Dig. 28, 5, 31, 1; 47, 4, 1, 1; 11, 1, 15, pr.; 40, 1, 61, pr.

43. Dig. 9, 2, 13, 2; 28, 5, 31, 1.

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have been added to some texts by the compilers of the Digest,⁴⁴ but, as Buckland puts it, the classical jurists "had gone some way on the road."⁴⁵ An idea that the *hereditas* is something distinct from its content is clear. In line with this is a statement in one of the Novels that testator and heir are "one person by our laws."⁴⁶ In the Digest it is laid down that the *hereditas* represents the *persona* of the deceased,⁴⁷ or, sometimes, that it represents the *persona* of the heir who is to enter so that his entry relates back to the opening of the inheritance.⁴⁸ It was a natural development that the *hereditas iacens* was regarded as a juristic person in the modern Roman law, in the *Pandektenrecht* or common law of Germany till 1900, in Roman Dutch law, in modern Greek law, in the old Russian law, in the Civil Code of the Baltic provinces (1864), and in the Civil Code of Latvia (1937).⁴⁹ A question somewhat of the same sort has been raised in English law as to whether charity is a legal person which can own property. It was argued in a case in which it was material to decide whether a vested gift can be made to charity, postponed as to time of payment.⁵⁰

Another type of juristic person is represented by the state, municipalities, and analogous political entities. In Roman law of the republic the *populus Romanus* was a corporate body, though its rights were governed not by the ordinary courts but

44. E. g. Dig. 43, 24, 13, 5.

45. Buckland, *Text-Book of Roman Law* (2 ed. 1932) 307.

46. Nov. 48. pr.

47. Dig. 41, 1, 33, 2; 41, 1, 34.

48. Dig. 2, 14, 27, 10; 45, 3, 16; 14, 3, 16; 14, 3, 28, 4; 14, 3, 35.

49. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 495, n. 4.

50. *Re Jefferies* [1936] 2 All E.R. 626. See note in 54 *Law Quart.Rev.* (1938) 25.

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by administrative machinery. It was a "publicistic entity."⁵¹ Under the emperors, in the third century, the fisc (*fiscus Caesaris*, purse of Caesar, i. e. the imperial treasury) could acquire property under private law and could sue and be sued in the ordinary courts.⁵² The emperor was not in any sense a corporation. He could dispose of his private property like any one else. But fiscal property was under "special publicistic rules."⁵³ "For practical purposes it was the property of the state."⁵⁴ Municipalities might be subjugated cities or communities which had retained or had been given corporate character, or, under the empire a local community of any sort on which the state had conferred rights.⁵⁵ Their capacities were restricted. They could take legacies,⁵⁶ but a municipality could not be instituted as heir, except by its own freedman,⁵⁷ until the later Empire.⁵⁸ Until the second century, provincial municipalities could not free their slaves.⁵⁹ In modern law we say that the state is the greatest of juristic persons.⁶⁰ In England it is said that the crown is a corporation,⁶¹ although, as Sir Frederick Pollock reminds us, this could hardly have been said when the King's peace died with him.⁶² Then, in addition to municipal corporations, there are

51. Buckland, *Text-Book of Roman Law* (2 ed. 1932) 175.

52. *Ibid.*

53. *Ibid.*

54. *Id.* 176.

55. *Ibid.*

56. Ulpian, *Rules*, xxiv, 28.

57. *Id.* xxii, 5.

58. *Cod.* 6, 24, 12.

59. *Cod.* 7, 9, 3.

60. Pollock, *First Book of Jurisprudence* (6 ed. 1929) 121-122.

61. *Co.Lit.* (1628) 15, 6. See Maitland, *The Crown as Corporation*, 3 *Collected Papers* (1911) 244.

62. Pollock, *First Book of Jurisprudence* (6 ed. 1929) 121-122.

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corporations having statutory powers of local government, e. g. urban and rural district councils, parish councils, improvement or inclosure commissioners or trustees,⁶³ navigation commissioners,⁶⁴ and port and harbor commissioners or trustees.⁶⁵ With the rise of the service state the number of corporations which do part of the work of the state without governmental powers in the older sense has become very great. In America, the federal government and the several states are juristic persons, as well as what we call public corporations of every sort, i. e. those recognized or created by the government for political purposes, counties, cities, towns, villages, school districts, drainage districts, irrigation districts, and the like.⁶⁶ All these have perpetual succession, can sue and be sued, can own property, and have at least some power of contracting. They connect with another type, namely, associations.

Generally accepted as the type of juristic person, as contrasted with natural person, is an association of human beings, granted legal personality by the state; what in the common law we call a corporation aggregate. As we have been in the habit of putting it in Anglo-American law this is a number of individuals having a franchise or grant of legal personality by the state by virtue of which they subsist as a corporate being, under a special name, and are vested by the policy of the law with the capacity of perpetual succession and of acting in several respects, however numerous the association may be, as a single individual.⁶⁷ Also, by virtue of statutes in many states, voluntary (i. e. unincorporated) associations are made capable of suing and be-

63. *Ex parte Newport Marsh Trustees*, 16 Sim. 346 (1848).

64. *River Tone Commissioners v. Ash*, 10 B. & C. 349 (1829).

65. *Mersey Docks and Harbor Board Trustees v. Gibbs*, L.R. 1 H.L. 93 (1866).

66. 2 Kent, *Commentaries on American Law* (14 ed. 1896) 275.

67. Adapted from *ibid.* 267.

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ing sued in the name by which they "hold property" or "transact business."⁶⁸ Furthermore, in the United States there is the "*de facto* corporation." The law recognizes and gives effect to the organized group through a common-law doctrine (i. e. one developed in judicial experience) to the extent of where it could reasonably have been and was believed there was such a corporation as the group assumed to be and acted as in good faith. Here it will be treated as such against every one but the state.⁶⁹ In the civil-law world share partnerships, partnerships with limited liability, partnerships *en commandite*, commercial partnerships, as well as chartered corporations are in varying degrees legal units.⁷⁰ With us also, on the analogy of the incorporated business company, certain business devices, such as holding companies and subsidiaries, in which one juristic person holds controlling shares in another, have to be reckoned with.⁷¹

There remain two more forms which carry the idea of juristic personality to the farthest extent. One is peculiar to the common law, namely, the "corporation sole," as Salmond puts it, "an incorporated series of successive persons."⁷² The other is peculiar to the law of Continental Europe and derived systems, namely, the foundation (*fondation*, *Stiftung*) an incorporated mass of property devoted to some purpose, treated as a legal person, but differing from a corporation in having no members but instead organs who administer the property and beneficia-

68. See Warren, Corporate Advantages Without Incorporation (1929) 233-274, 547-559.

69. Ibid. 683-718.

70. Lyon-Caen et Renault, Manuel de droit commercial (14 ed. 1924) nos. 121-126.

71. Ballantine, Corporations (rev. ed. 1946) §§ 134 ff.

72. Jurisprudence (9 ed. 1937) 429. See Maitland, The Corporation Sole, 3 Collected Papers (1911) 210.

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ries. The latter, however, have no rights as members or voting rights, and cannot influence the administration of the property.⁷³

How are all these different things, supernatural beings, idols, unborn children, deceased persons, groups of individuals, associations of many sorts, masses of property, and single individuals in an office with perpetual succession, to be brought, along with the individual human being with recognized and secured interests, into one category of legal units? What, if anything, have they in common for juristic purposes? This is the problem of the theory of juristic personality.

(2) *History of the theories of juristic persons.* The conception of the separate personality of the incorporated group or association was not fully worked out in Roman law. In modern law there is a clear cut distinction between the personality of a corporation and the personalities of the members. The incorporated company may sue and be sued and may engage in legal transactions which bind it but not its members, and bind it through all changes in membership. Without regard to what happens to the members the corporation remains the same. But this conception of the independent personality of the corporation was gradually developed, nor does it obtain today completely for all purposes, as witness the doctrine as to equity "looking behind the corporate form" in certain cases. The oldest groups are kin groups or

73. Amos and Walton, *Introduction to French Law* (1935) 50.

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groups based on the family. At Rome, where legal theory, as distinguished from theories of social control begins, no theory of group personality was required for the family which was represented by the human personality of the *paterfamilias*, whose authority was long complete, and in whom the powers were reposed to the end. Professor Duff, who considers corporate personality a "very abstract and artificial conception" tells us that the lawyers of the republic did not get beyond the first rudiments of it.⁷⁴ He considers that although the Roman jurists had to think about burial societies, societies of tax farmers, estates on which an heir had not entered, municipalities, and charities, the practical solutions they reached rested on "a very slender foundation of abstract legal theory."⁷⁵ On this slender foundation the medieval jurists were able to build a broader one and the jurists of today have been able to evolve no less than sixteen theories of the nature of juristic persons.⁷⁶ At the core of the problem is the nature of the legal personality of an association; an organized body of men to which a lawmaking organ of society has given power to protect its interests, where the wills which set these powers in motion are wills of certain men determined according to the organization of the as-

74. Duff, *Personality in Roman Private Law* (1938) 129.

75. *Ibid.* 236. He finds no thorough analysis of who owns property given to *collegia*. *Ibid.* 134.

76. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 496.

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sociation.⁷⁷ But the powers conferred by the politically organized society are rights (in the wider sense) of the men who set them in motion. It is not the interests of those men that are secured. Their wills are attributed to the association as a corporation, and we say it is the corporation that has the rights.⁷⁸

Of the numerous theories which have been urged in modern terms, Wolff, in the best discussion of the subject in English,⁷⁹ considers there are four of which we must take account today. As will be seen further on, I think at least seven have had such influence or have such following that they call for consideration. It is true, as has been said, that with a little skill or lack of scruple we can reach almost any practical result from any particular theory.⁸⁰ But because juristic ingenuity can abuse these theories it does not follow that we should disregard them. Many serious practical consequences depend on them. For example, in the United States we think habitually of juristic persons as corporations and shape our theory to the incorporated trading company or industrial enterprise. Hence Professor E. H. Warren goes so far as to lay down that if a statute recognizing an economic entity, and giving it power to sue and be sued as such, does

77. Gray, *The Nature and Sources of the Law* (2 ed. 1921) 51.

78. *Ibid.*

79. *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 495.

80. Pahra, *Jurisprudence* (1946) 256.

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not use the term "corporation" the failure to call it a "corporation" may be decisive in another jurisdiction where it would exercise its power of suing.⁸¹ Here we see the concession theory in action to lead to an unhappy result.

Municipalities in Roman law have been spoken of above. As to private associations, a title of the Digest, "How Proceedings are Had on Behalf of Any Corporation (Universitas) or Against It,"⁸² certainly looks like a body of law as to actions by and against corporations. But private *collegia* could not have sued under the old *legis actio* system since they could not appear personally and representation was not allowed. In an extract from Gaius on the provincial edict in the Digest, we are told that where private persons were permitted to constitute a corporation they were like a municipal corporation. They had a special right to have common property, a common chest, and an *actor* or *syndicus* by whose agency whatever was to be done on the general behalf could be transacted as in case of a municipal body. No such association could be set up as a corporation, however, without express enactment or a general law for formation of associations of the sort.⁸³ When, under the empire, certain gods could be instituted heirs, it is not certain who was

81. Corporate Advantages Without Incorporation (1929) 522-523.

82. Dig. 3, 4.

83. Dig. 3, 4, 1.

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thought of as owner of the property. The chief modern authority holds that it was the state since the property was administered by the magistrates.⁸⁴ As to property given to Christian churches by will (allowed by legislation of Constantine) it is far from clear. The property was administered by the bishop and the *Oeconomus* and probably was regarded as owned by all of the members, but there were many rules restricting administration.⁸⁵ As to gifts to charity and charitable foundations, as Buckland says, "the texts so constantly treat them as on the same footing as churches, monasteries and *civitates* that it is hardly possible not to credit them with personality, and this is in fact almost universally accepted."⁸⁶ Some hold that the administrators were thought of as the owners. It seems more in accord with the texts that here is a case of true corporations.⁸⁷

On the revived teaching of Roman law in twelfth-century Italy, all juristic theory had to be drawn from the *Corpus Iuris Civilis*, postulated as authoritative legislation binding upon Christendom as "the empire." For most purposes this meant the *Digest*, but, as has been seen, very few texts of the *Digest* yield an express theory of corporations and the field for implications is so wide

84. 2 Mommsen, *Römisches Staatsrecht* (1874) 59.

85. *Cod.* 1, 2, 19, 2; 1, 3, 41, 3; 1, 3, 45, 9.

86. *Text-Book of Roman Law* (2 ed. 1932) 179.

87. *Ibid.*

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that modern writers have been quite unable to agree on any general Romanist theory. The Glossators did not achieve one. But as their school was declining the canonists, who had to consider the nature not of a municipality or a gild but of a collegiate church, worked out a theory which, developed by jurists, taken up also by writers on the common law, has been somewhat made over in very recent times and is still widely adhered to. Pope Innocent IV, in 1245, in pronouncing that an *uniuersitas* or a *collegium* could not be excommunicated, put it on the ground that a corporation was a person but was a person only by a fiction.⁸⁸ Taken up by legists as well as canonists, it came to be combined with a "concession" theory, likewise derived from the canonists, but with more foundation in the Roman texts. It was put in fully developed form by Savigny.⁸⁹

As Savigny put it, along with men or natural persons, the law recognizes as subjects of proprietary rights certain fictitious juristic persons of which corporations are a species. These fictitious or ideal persons must be carefully kept separate from the natural persons we speak of as their members. They have capacity for proprietary rights, but are incapable of knowing, intending, or willing.⁹⁰ The relation of the corporation or members to these fictitious persons is that of *tutor* and *pupillus* in Roman law or

88. Sext, 5, 11; 3 Gierke, *Das deutsche Genossenschaftsrecht* (1881) 279-282.

89. 2 Savigny, *System des heutigen römischen Rechts* (1840) §§ 85-102, in English in Savigny, *Jural Relations* (transl. by Rattigan, 1884) 175-283.

90. 2 Savigny, *System des heutigen römischen Rechts* (1840) § 85, in English in Savigny, *Jural Relations* (transl. by Rattigan, 1884) 178.

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between committee of his estate and a lunatic in the common law. The fictitious persons can acquire property through their guardians, and, if they take advantage of contracts can be held for the burden. They can be held for unjust enrichment, but not for delict (tort or crime). In case of misbehavior by their guardians they may be put an end to or regulated by an administrative proceeding. As they are fictitious entities of the law, their personality must have its origin in some authoritative act of the sovereign or state. A corporation is so completely separate from its members that it may continue without even a single member. It should be noted that Savigny thinks not of agency but of guardianship. There are no natural rights involved because an artificial person cannot have them. The property of the corporation does not belong to any real persons. Hence the state does not exercise jurisdiction over it as in private law, but exercises administrative control.

In the common law we never went so far in carrying out the fiction theory to its logical conclusions as did Savigny. But in the fifteenth century the concession theory was received from the canonists. It was laid down in extreme form by Blackstone.⁹¹ Maitland says truly: "Nowhere has the concession theory been proclaimed more loudly, more frequently, more absolutely than in America."⁹² The classical statement is that of Chief Justice Marshall in the Dartmouth College Case: "A corporation is an artificial being, invisible, intangible, existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation

91. 1 Blackstone, Commentaries (1765) 472-474.

92. Gierke, *Political Theories of the Middle Age* (transl. by Maitland. 1900) xxxi, citing 2 Kent, *Commentaries on American Law* (14 ed. 1896) 267 ff.

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confers upon it either expressly or as incidental to its existence.”⁹³

Dissatisfaction with the fiction and concession theories began to develop in Continental Europe in the nineteenth century, and, although in England and America the language of these theories is repeated, the practice of the courts is by no means always conformed to them. Where the Romanist idea of contract agency and of publicistic or administrative control prevails, whether or not a juristic person can in theory act of itself is no great matter. As the canonist and common-law doctrine, *qui facit per alium facit per se*, does not obtain, a physical person is not held for wrongs which his guardian or agent does to third persons. But if the organ of a corporation, e.g. a director within the scope of his function, does the wrong, the corporation is liable, it is said, “as is a human being for his hand or his tongue.”⁹⁴ On the other hand, at common law a franchise is property and such matters are in the domain of private not public law. There is no administrative or publicistic regime to take into account. Likewise the power theory of agency and the doctrine of liability for torts of servants or agents make the theoretical problems of Continental law, whether a corporation can itself act, i.e. through its appropriate organs, or can

93. Marshall, C.J. in *Dartmouth College v. Woodward*, 4 Wheat. (U.S.) 518, 636, 4 L.Ed. 629 (1819).

94. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 509-510.

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only act through others (i.e. agents) seem purely academic and practically negligible. As Maitland points out, "a certain half-heartedness" in our treatment of unincorporated groups "whose personality we will not recognize while we make fairly adequate provision for their continuous life," is more an offense against the science of law than anything of serious practical consequence.⁹⁵ While, however, we continued to adhere to the concession theory, the Pandectists gave it up.⁹⁶ Also the question of torts and crimes of corporations gave trouble in both systems, and in Anglo-American law *quo warranto*, while a prerogative writ, was prosecuted in the ordinary common-law courts and was not a matter of discretionary administration such as Savigny wrote of. The franchise, as property, was something which could only be taken away by due process of law. It was inevitable with the rise of the trading company and incorporation of business and industrial enterprises of every sort that the whole theory of juristic persons be re-examined everywhere. As a result there have come to be a number of competing theories which will presently be looked at in detail.

*The unincorporated association as an entity.*⁹⁷ Although Anglo-American law has no doctrine of semi-personality such as

95. Gierke, *Political Theories of the Middle Age* (transl. by Maitland, 1900) xxxii.

96. 1 Windscheid, *Pandekten* (9 ed. 1906) § 60; 1 Dernburg, *Pandekten* (5 ed. 1896) § 63; Regelsberger, *Pandekten* (1893) §§ 77-78.

97. See Warren, *Corporate Advantages Without Incorporation* (1929); Lloyd, *Law of Unincorporated Associations* (1939).

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has been suggested on the Continent,⁹⁸ an association as a *de facto* entity may have many of the advantages of corporate existence without a grant of legal personality by the state. Its existence as a *de facto* entity may be recognized and interests asserted in title of it may be secured or even interests asserted against it may be enforced, it may sue and be sued, may own property and make enforceable contracts to greater or less extent, even though it is not recognized to the extent of legal personality as a corporation. Often the association as an entity is treated as owning property while in other connections the members are treated as somehow owners. Thus, if a member of a social club or of a trade union is wrongfully expelled, it is said that if a right of property is involved a court of equity will enjoin the committee or officials of the club from enforcing the expulsion. The ground of jurisdiction is said to be "that the member has an interest in the assets."⁹⁹ But he is not for a moment held a co-owner. His interest is not alienable, does not pass to a representative on his death, and he cannot claim partition. Nor can his interest be reached by his creditors. Yet however undefined the legal position of an unincorporated association may be, some of the most practically powerful organizations in the English-speaking world prefer to remain unincorporated. Thus trade unions resist incorporation in order to escape tort liability, *quo warranto*, and liability of its funds for breach of contract. Yet a union may get a decree of specific performance of a contract with an employer, as part of a collective bargaining agreement, to recognize and give effect to assignments of future wages of em-

98. In order to meet certain difficulties of litigation, French law at one time recognized a *demi-personnalité*. 1 Baudry-Lacantinerie, *Traité de droit civil* (2 ed. 1902) no. 300. It was not clear to what this partial personality extended and there was no significant result. See also Paton, *Text-Book of Jurisprudence* (2 ed. 1951) 344-345.

99. *Rigby v. Connol*, 14 Ch.D. 482 (1880); *Maclean v. Workers' Union*, [1929] 1 Ch. 602, 625; *Mesisco v. Giuliano*, 190 Mass. 352, 76 N.E. 907 (1906); *Robertson v. Walker*, 50 Tenn. (3 Baxt.) 316 (1874).

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ployees for union dues.¹⁰⁰ At common law an unincorporated association cannot be sued in its own name, having no legal personality, and an action upon contract can be maintained only against members who have bound themselves personally or who can be treated as principals under the law of agency. There is no implied authority as in case of partnership. Some states, as said above,¹⁰¹ allow unincorporated associations to sue and be sued by the names in which "they hold property and transact business." But these provisions do not cover torts and have not made it easy to reach property or funds of or held for the associations. In England, a trade union can sue in tort but cannot be sued in tort.¹⁰² But this is due to legislation. As it was put recently: "The association is not merely the aggregate of the persons who compose it, and the presence of the corporate fiction is not necessary to secure its individuality." It might be called a "near corporation."¹⁰³

Entities other than groups or associations. In the common law there is the anomaly of the corporation sole with a long history going back to 1568 when in Broke's Abridgement a parson of a church was spoken of as a "corporation in succession."¹⁰⁴ This was taken up by Coke, the oracle of our law.¹⁰⁵ Maitland's

100. *Sanford v. Boston Edison Co.*, 316 Mass. 631, 56 N.E.2d 1, 156 A.L.R. 644 (1944).

101. *Supra* n. 68.

102. *National Union of General and Municipal Workers v. Gilliam*, [1946] 1 K.B. 81. The legislation following the *Teff Vale Case*, [1901] A.C. 426 only precluded suits against the Union.

103. Uthwatt, J., later Lord Uthwatt, in *National Union of General and Municipal Workers v. Gilliam*, [1946] 1 K.B. 81, 88. Kent uses "quasi corporation" for "persons and associations who have a corporate capacity only for particular specified ends, but who can in that capacity sue and be sued as an artificial person." 2 Commentaries (14 ed. 1896) 278.

104. Broke, Abridgement, Corporations et Capacities, pl. 41 and pl. 68. See Maitland, *The Corporation Sole*, 3 Collected Papers (1911) 213.

105. Co.Lit. 250a; *Sutton's Hospital Case*, 10 Rep. 1a, 23a, 29b (1612).

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conclusion is well justified: “. . . the ecclesiastical corporation sole is no ‘juristic person;’ he or it is either natural man or juristic abortion.”¹⁰⁶ But it is firmly fixed in the English law books as a species of corporation.¹⁰⁷ As to masses of property treated as juristic persons in the civil law, the development in modern law from the pious uses and foundations of the later Roman law and the different theories by which it has been explained may be found conveniently in Vangerow’s Pandects.¹⁰⁸

(3) *The theories in detail.* This is something of more than academic interest. Juristic theories may be drawn from the phenomena of legal systems in the attempt to put them in the order of reason, or, as Bentham liked to say, to make them cognoscible. Or they may be drawn from outside of the law, from religion or philosophy or ethics, in the attempt to make the precepts of a legal system conform to some universal ideas of right and justice. In either case they may affect the phenomena of a legal system by suggesting and furthering a molding of the body of legal precepts to the theories and, where the phenomena are not adequately explained, giving rise to confusion. When theories and precepts do not agree, the fault may conceivably lie with either. But if a theory is widely held, a tendency to strain precepts to bring them into accord with it, sometimes against the pull of experience in another direction, may have ill consequences.

106. The Corporation Sole, 3 Collected Papers (1911) 210, 243.

107. 8 Halsbury, Laws of England (2 ed. 1933) 6, 8.

108. 1 Vangerow, Pandekten (7 ed. 1863) 99–101.

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A few examples of how the law as to juristic persons is affected by theories of the nature of legal personality may suffice. As to *de facto* corporations there is a narrower view that there can be none unless there could have been such a corporation *de jure*. This is argued on the concession theory. There is a more liberal view that if the parties could have in good faith believed they were incorporated and acted in good faith accordingly, only the state in a direct proceeding can challenge the corporate existence.¹⁰⁹ In a number of states statutes so provide.¹¹⁰ Those who allow a *de facto* corporation more liberally urge that the association has an actual existence which may be recognized even if it is not incorporated and that treating it as a corporation except as against the state is not a matter of estoppel.¹¹¹ Likewise in case of unincorporated associations the concession theory, when strictly adhered to, and an instinctive feeling that associations are realities recognized rather than created and clothed with fictitious personality by the state, are constantly in conflict in the cases, and legislation tends to confer "corporate advantages without incorporation" the interpretation and application of which will depend on the theory of corporate personality adopted.¹¹² Such phrases as "*demi-personnalité*," and "quasi-corporation" tell a story. Also there has been much argument that a corporation is not entitled to the constitutional guarantees of due process of law because "artificial entities have no natural rights," and courts have said that there was no guaranteed

109. *Smith v. Sheeley*, 12 Wall. (U.S.) 358, 361, 20 L.Ed. 430 (1870); *Davis v. Stevens*, 104 F. 235 (D.C.S.D.1900); *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N.E. 357 (1885).

110. See a list of them in Warren, *Corporate Advantages Without Incorporation* (1929) 745.

111. *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N.E. 357 (1885).

112. The title of Professor Warren's book "*Corporate Advantages Without Incorporation*" is suggestive. He was a rigid adherent of the concession-fiction theory.

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liberty of contract for corporations, while other courts have held the contrary.¹¹³ Under what Maitland calls the "bracket theory" the constitutional guarantee would extend to the members whose interests are symbolized by the corporation. Likewise, in the conflict of laws, and particularly in the treatment of foreign corporations, much depends on what one's theory of legal personality teaches him as to the nature of a corporation.

Seven theories of juristic personality which deserve detailed consideration are: (a) The concession theory, as combined with the fiction theory; (b) the fiction theory as modified by eliminating the concession idea; (c) the organism theory; (d) the entity or group personality (realist) theory; (e) Jhering's (called by Maitland the bracket) theory; (f) the form of ownership theory; and (g) Kelsen's theory.

(a) *The concession theory.* As the paramount agency of social control, politically organized society has always been jealous of other organizations which create conflicting loyalties and unite activities which may be used against it. It only attained its paramountcy after much struggle with kin organizations and associations on their model and with religious organizations. Also associations could easily breed and conduct conspiracies and rebellions. It was but natural that the state, as soon as it became thoroughly established should long exercise a strict control over the right of association. There is like-

¹¹³. Opinion of the Justices, 163 Mass. 589, 40 N.E. 713, 28 L.R.A. 344 (1895); *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S.W. 955 (1899).

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ly to be a substratum of truth under all theories, and behind the concession theory is the undoubted truth that the law determines what shall be recognized as legal units. But granting this, a distinction must be drawn between creation and recognition. The concession theory assumes that associations are artificial creations of agencies of politically organized society and hence that interests asserted in title of them are negligible except as the lawmaking organ chooses to take account of them.

Burial societies seem to have been older than the Twelve Tables and were there recognized as having a rule-making power over their own affairs.¹¹⁴ It is not clear whether private associations (*collegia*) needed to be authorized under the Roman republic, nor does it seem that they had corporate character. Under the empire, however, no *collegium* could be founded without authority of the state, either express or under a general enactment.¹¹⁵ Indeed, Mitteis holds that the right to form a *collegium* and the grant of corporate capacity were distinct and were given separately till the time of Marcus Aurelius.¹¹⁶ At any rate, the Digest clearly taught the later medieval and modern law that legal personality could only come from the state.¹¹⁷ As is was put in a book much read in the formative era of American law, "communities, ecclesiastical and secular, are assemblies of many persons united into one body, that is, formed by the prince's consent, without which these kinds of assemblies would be unlawful."¹¹⁸

114. Dig. 47, 22, 4.

115. Buckland, Text-Book of Roman Law (2 ed. 1932) 177.

116. Römisches Privatrecht (1908) 309.

117. Dig. 47, 22, pr. and 1.

118. 1 Domat, The Civil Law in its Natural Order (transl. by Strachan, Cushing's ed. 1850) 148, transl. from 1 Domat, Les loix civiles dans leur ordre

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Today the English texts tell us that "a corporation may exist by common law, by royal charter, by authority of Parliament, by prescription, or by custom."¹¹⁹ But as corporations by custom the text quoted gives only the Crown, Parliament, a parson, and a bishop.¹²⁰ At common law the Crown has power to incorporate by charter any number of persons assenting to be incorporated.¹²¹ Before the Reformation, the Pope could create a "spiritual corporation," e. g. an abbot and convent.¹²² Coke's Second Institute, cited for corporation by prescription, seems to refer to franchises generally.¹²³ Practically the ordinary mode of incorporation is by Parliament, either by a special statute or under a general statute providing for incorporation by complying with its provisions.¹²⁴

In the United States there are few corporations sole,¹²⁵ and no corporations by custom. Kent tells us that "there is no doubt that corporations . . . may also exist in this country by prescription, which presupposes and is evidence of a grant, when the acts and proceedings on which the presumption is founded could not have lawfully proceeded from any other source."¹²⁶ But

naturel, liv. prélim. tit. II, § 15 (1689). Strahan's transl. (2 ed. London, 1737) was largely used in America before Cushing's new edition. It is quoted in the first American text on corporations, Angell and Ames, Corporations (1 ed. 1832) § 66.

119. 8 Halsbury's Laws of England (2 ed. 1933) 18.

120. Ibid. 119. In *Byrd v. Wilford*, Cro.Eliz. 464 (1596) the Chamberlain of London is said to be a corporation sole by custom.

121. *Sutton's Hospital Case*, 10 Rep. 1a, 31a, 33b (1612); *Elve v. Boyton*, [1891] 1 Ch. 501, 507.

122. *Hecker v. Provost of Cambridge*, Y.B.Mich. 14 Hen. 8, pl. 2, fol. 2, 3b (1523). But see *King v. Lord Dacres*, Case of the College of Greystocke, Dyer, 81a (1554).

123. 2 Inst. 230 (1642). See 1 Kyd, Corporations (1793) 14.

124. 8 Halsbury's Laws of England (2 ed. 1933) 27.

125. Mostly by statute. Ballantine, Corporations (rev. ed. 1946) 30.

126. 2 Kent, Commentaries on American Law (14 ed. 1896) 277.

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what were held to be corporations by prescription in America were towns, school districts, and the like which had functioned as such for a very long time with no record of their establishment.¹²⁷ Quaere whether their corporate existence could not have been challenged by the state, and so whether they were not *de facto* corporations. Ecclesiastical corporations were established by the Crown before the Revolution,¹²⁸ and the city of Annapolis was chartered by Queen Anne.¹²⁹ Coke's proposition in Sutton's Hospital Case¹³⁰ established the common law for us and the effect under our constitutions was to limit the power of creating legal entities other than human beings to the legislature. But the Supreme Court at one time thought that as to free negroes legislation was required to give them substantial legal personality.¹³¹ Moreover, as to *de facto* corporations there is a legislative origin only by the fiction of a lost grant which becomes a very transparent one in such a case.

Not only does the concession theory fail to meet the very common case of *de facto* corporations, but it is seriously strained by difficult questions whether there is creation of a legal entity when statutes give "corporate advantages without incorporation." The theory requires a narrow interpretation of such statutes which Professor Warren urges, although he has to admit the courts have

¹²⁷ Stockbridge v. West Stockbridge, 12 Mass. 400 (1815); Robie v. Sedgwick, 35 Barb. (N.Y.) 319, 326 (1861).

¹²⁸ Pawlet v. Clark, 9 Cranch. (U.S.) 292, 3 L.Ed. 735 (1815).

¹²⁹ McKim v. Odom, 3 Bland Ch. (Md.) 407, 416 n. (1828) but the court in that case lays down the general American doctrine requiring a legislative origin. Ibid. 417.

¹³⁰ 10 Rep. 1a, 31a (1612).

¹³¹ Taney, C.J. in Dred Scott v. Sandford, 19 How. 393, (U.S.) 403 ff., 15 L.Ed. 691 (1856).

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not been inclined to adopt it.¹³² It is argued that there must be a formal incorporation; that nothing short of this can create a legal unit, whatever powers or capacities may be recognized or granted.¹³³ But this is anything but uniformly adhered to and is asserted chiefly to relieve labor unions from liabilities which the law imposes on every one else.¹³⁴

(b) *The fiction theory.* As has been said above, this theory grew up with the concession theory and was shaped to the will theory of jurisprudence in the nineteenth century. It has not been easy to separate them. It is clear enough, unless we hold to eighteenth-century ideas of natural law, that legal personality is a matter of positive law. It is something which can be had only where there is compliance with precepts of the positive law. Where, as today, the human being as a moral entity is therefore taken to be a legal entity, it is easy to assume that a legal entity must be a human being or a clear analogue of one. But a human being as a natural person is also a legal person only when the law so provides, as is shown by the case of the slave, of the free negro in the southern states of the United States before

132. Warren, *Corporate Advantages Without Incorporation* (1929) 11-13, 268, 274, 558-559 (1929).

133. *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542, 152 A.L.R. 1202 (1944).

134. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1921). See cases *contra* 92 *University of Pa. Law Rev.* 328 (1944).

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the Civil War, and of civil death. Even today, some of the United States provide by statute for civil death.¹³⁵ But these cases seem anomalous today and it is an easy step from the fiction theory to assume, as a truth of sociology, that all group activity, as apart from the mere grant of legal personality is the creation of the state. This is mischievous and those who urge the fiction theory are by no means always careful to avoid it. Nor are advocates of the entity theory equally careful at all times to keep separate the right to associate, the *de facto* existence of groups and associations, and the recognition or grant of personality by the law. We are still so near to the natural-law thinking of the last century that to keep "natural" and legal personality distinct is not always easy. The law may prohibit all associations or denounce organized groups for any purpose or for any but some particular purposes, as in Roman law of the empire and in more than one autocratic state in the modern world, or it may allow a wide liberty of association for lawful ends but without necessarily according legal personality, as generally today, granting legal personality in full or in part to some and not to others. Or conceivably it might grant legal personality wherever there is an organization with an inner order, i.e. what Hauriou calls an "institution." ¹³⁶

135. See *In re Nerac*, 35 Cal. 392 (1868); *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148, 11 L.R.A. 264 (1888).

136. *Ante* § 27.

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There are a number of forms of the fiction theory. As Savigny put it there is no reality at all. Legal capacity is considered "as extended to artificial subjects admitted by means of a pure fiction." Such a subject is a juristic person—"a person who is assumed to be so for purely juristic purposes."¹³⁷ On the other hand, Salmond, writing after Gierke, holds that the group or association has a real existence, but has no real personality in a philosophical sense. When the law grants legal personality to a human being, it grants legal power to a real will. When it grants legal personality to a company it gives personality to an entity with no mind and no will.¹³⁸ His argument as to will is much the same as Gray's.¹³⁹ When Lord Shaw in the idol case,¹⁴⁰ says that "the will of the idol must be respected" there is undoubted fiction. What it means is that if we adopt a will theory and must attribute a will to a juristic person, we attribute some one's will to that person in order to reach certain legal results. As Gray points out, except in the case of normal human beings there always is the same fiction of attributing the will of one to another or to something other than himself. The step, he says, is no harder whether the legal person is an idiot, a steam tug, or a corporation. Neither

137. 2 Savigny, *System des heutigen römischen Rechts* (1840) § 85, p. 236 (transl. by Rattigan as Savigny, *Jural Relations* (1884) 176).

138. Salmond, *Jurisprudence* (9 ed. 1937) § 113.

139. *Supra*, note 12.

140. *Ante*, note 27.

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has a real will, but in the case of the juristic person there is, he adds, a further fiction, namely, the forming of "an abstract entity to which the wills of men may be attributed."¹⁴¹

But is a group, an organized body of men, or an association, an *abstract* entity? It has been said that God made the idiot while men made the association. But men also made the steam tug. Associations and organized groups of men are significant components of society. As far back as we know about men we know them in such groups and associations. They are as concrete as the men, some of whose activities they organize without merging their personalities. The state recognizes some of them, attributes to them rights, powers, liberties and privileges, and imposes duties upon them, just as it did in the United States in case of the free negro before the Civil War, or of the slave in Roman law after the constitution of Antoninus Pius.

Under the combined concession, fiction, and will theory it was considered that the will which was imputed by law, being a fiction of law, could not be directed to a crime. It was imputed only for lawful ends. As will be seen presently, American decisions have been going far to give this up. In England also there is an increasing tendency to hold corporations for certain crimes, but it is still uncertain how far the courts will go.¹⁴² There has been a confusion here very like that which denied resti-

141. Gray, *Nature and Sources of the Law* (2 ed. 1921) 52.

142. *The King v. Cory Brothers & Co. Ltd.*, [1927] 1 K.B. 810; *Triplex Safety Glass Co. v. Lancegaye Safety Glass, (1934) Ltd.*, [1939] 2 K.B. 408; *Rex v. I. C. R. Haulage, Ltd.*, [1944] K.B. 551.

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tution in case of unjust enrichment of a corporation through an *ultra vires* transaction, where the fiction of an implied promise was the obstacle.¹⁴³ There was an assumption that a juristic person can only do what it can do legally, confusing what can be actually done with what can be done in accordance with law. A natural person can act either by himself or through agents. Under Anglo-American ideas of agency a juristic person only acts through agents. If either acts beyond his or its legal power, the result is legal invalidity or liability. Except as public policy may intervene, there may well be liability for legally invalid action. Legally invalid acts may have legal consequences though not the legal consequences intended. They may create liability even if not obligation in the sense of a debtor-creditor relation. An example may be seen in the American rule as to making restitution where there is unjust enrichment through an *ultra vires* transaction.¹⁴⁴

So obstinate is the concession-fiction-will theory, that it is still argued that a corporation is not liable for torts committed by its servants in the course of carrying out *ultra vires* undertakings. We are told that those who are engaged in the undertaking are not in law the servants of the company and that even approval by all the

143. *Sinclair v. Brougham*, [1914] A.C. 398.

144. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 59, 11 S.Ct. 478, 488, 35 L.Ed. 55 (1891).

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shareholders as well as by the directors will not make the company liable, since the question is one of legal power.¹⁴⁵ Professor Paton regards this proposition as “logically unassailable,”¹⁴⁶ because the company is not capable of acting beyond its power. It is true it cannot act legally so as to produce intended legal consequences beyond its legal power. But there is a distinction between capacity for legal transactions and capacity for torts. In case of fraud by an infant, policy prevents what is in effect holding him on a legal transaction. Such may be the real basis of *Sinclair v. Brougham*.¹⁴⁷ The law in England is not entirely certain.¹⁴⁸ In the United States the doctrine of no liability for torts in *ultra vires* undertakings is decisively rejected.¹⁴⁹ The will theory has broken down under pressure of the social interest in the general security and need of holding juristic persons for torts and crimes.

Wolff, in the best account of the theory which has appeared, seeks to “salvage such parts of the fiction the-

145. This is thoroughly discussed in Warren, *Torts by Corporations in Ultra Vires Undertakings* (1926) 2 Cambridge Law Journ. 180; Goodhart, *Corporate Liability in Tort and the Doctrine of Ultra Vires*, *ibid.* 350, reprinted in Goodhart, *Essays in Jurisprudence and the Common Law* (1937) 91.

146. *Jurisprudence* (1946) 275, (2 ed. 1951) 339.

147. *Supra*, note 143.

148. *Campbell v. Paddington Corp.*, [1911] 1 K.B. 869; Salmond, *Law of Torts* (10 ed. 1945) 56-57; Winfield, *A Text-Book of the Law of Tort* (1937) 118.

149. Harper, *Torts* (1933) 654.

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ory as it would seem reasonable and desirable to save,"¹⁵⁰ by cutting off the concession and will ideas which are not necessarily involved. So stripped of unessentials he considers that it is not a theory at all. "It does not," he says, "attempt to explain anything. It is, like every fiction, a formula. Moreover, it does not assert that something non-existent is endowed with personality."¹⁵¹ It recognizes, as he sees it, that no uniform answer can be given as to the nature of the entities to which legal personality is attributed. The law recognizes legal capacity or endows with legal capacity (1) human beings, (2) certain associations of human beings considered proper to have legal capacities, (3) certain business devices, (4) certain property traditionally so treated because it moves or is moved about all over the world and its activities give rise to relations which must be dealt with by courts when the owners are not accessible, and (5) certain devices for charities and for devotion of property to general uses or public purposes. But, as he admits, all this can be said without the help of the "fiction formula."¹⁵² What seems to him to justify putting the matter in terms of a fiction is that in civilized society of today, where slavery has been abolished, it is "axiomatic both from a religious and a

150. On the Nature of Legal Persons (1938) 54 Law Quart.Rev. 494, 505. There is a full discussion of Wolff's article in Friedmann, *Legal Theory* (2 ed. 1947) 371-384.

151. *Ibid.* 506.

152. *Ibid.*

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moral point of view that man . . . has apart from all law a natural dignity and personality, and is, therefore, in law capable of having rights [in the broader sense].” If any type of human being were not so recognized today he submits the polity would not be regarded nowadays as one ruled by law.¹⁵³ But here he uses “law” for the Continental *droit*, *Recht*, “right plus law” and in effect argues from the standpoint of natural law. On the other hand, he says, from this standpoint the personality of a foundation or association is not self-evident. Where everybody today would agree as to the category of natural persons, there is great diversity as to what are recognized as juristic persons. For example: “English law refuses personality to a partnership, Scotch and French law grant it. Italian law grants it to commercial, not to non-commercial partnerships.”¹⁵⁴ But Anglo-American law denies that a partnership is an entity not because of any special commercial conditions in the English-speaking world, but because the older fiction theory became fastened in our legal thinking in the formative era of our commercial law.

Wolff has taken over into his revised version of the fiction theory the idea of reality of the entities recognized as juristic persons and combined it with a natural-law idea of natural persons. Indeed, he admits that in order

153. Ibid. 506-507.

154. Ibid. 507.

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to perfect the theory a good deal must be adopted from the entity theory and that when this is done the two are much alike.¹⁵⁵ But he considers that it has three advantages: (1) It is a theory of the law that is, and so analytically to be preferred; (2) it is more elastic than the other theories; (3) it makes it easier to disregard juristic personality in cases where that is desirable.

As to the first point, he urges that the fiction theory, as he restates it, does not, as the entity theory does, in effect proclaim that whenever a body of men is a living organism it deserves for that very reason to be accorded legal personality.¹⁵⁶ To this, however, one might respond that the fiction theory has served to hold back recognition of legal personality where it ought to be given. This is brought out strikingly in the confused condition of Anglo-American law as to voluntary associations.¹⁵⁷ It took time for the law to accord legal personality to all human beings. In the same way it is more and more giving legal personality to groups and associations. Thus there is continual giving of legal capacities to voluntary associations of all kinds, and continual extension of powers to those who comply with general statutes providing for incorporation.¹⁵⁸ Also in spite of refusal formally to recognize partnerships as entities, equity,¹⁵⁹ the Uniform

155. Ibid. 510.

156. Ibid. 511.

157. See a concise statement in Paton, *Jurisprudence* (1946) § 75 (2 ed. 1951) § 90. This is really the whole theme of Warren, *Corporate Advantages Without Incorporation* (1929).

158. E. g. the "all power" purpose clauses in recent incorporations. See Ballantine, *Corporations* (1946) § 82.

159. 1 Story, *Equity Jurisprudence* (13 ed. 1886) § 680.

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Partnership Act,¹⁶⁰ and the Bankruptcy Act,¹⁶¹ have gone far in the United States to reach that result in substance.

As to the elasticity of the fiction theory as an advantage, we are told that it allows certain bodies to be treated as persons in some respects and as not persons in others. But this is quite as possible without any fiction. A slave under the constitution of Antoninus Pius was a real entity, but had legal personality only to the extent of being able to start a legal proceeding to inquire whether he was cruelly treated. A free negro in some of the United States before the Civil War was a real entity and had a partial legal personality, but only in very few connections. A group or association in the same way can be a real not a fictitious entity and yet not have legal personality in all relations. Wolff speaks of "relative personality" and cites the German commercial partnership, which in most respects is not treated as a person, and yet can contract with a partner, can be adjudged bankrupt while the partners are not, and can sue a partner and be sued by him. Also the same persons can be members of a number of distinct partnerships with separate property.¹⁶² But the fiction theory does not significantly help in understanding these situations. They might as well be cited for the concession theory, saying that only a partial or relative legal personality has been conceded. English procedure allows actions between a partnership and a member and between partnerships with a common member.¹⁶³ Does it matter whether we think of fictitious or of real entities here?

160. Warren, *Corporate Advantages Without Incorporation* (1929) 293-301. It is instructive to compare the general part and definitions in the Act with the special provisions, which continually assume the entity which the general part denies.

161. *Ibid.* 275-292.

162. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 512.

163. *Rules of the Supreme Court*, Order XLVIII A, r. 10.

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Wolff's third claim of advantage is that "the fiction formula makes it easy to reject some undesirable consequences of legal personality even in the case of fully developed legal persons such as companies."¹⁶⁴ This "disregard of the corporate fiction" or "looking behind" or "piercing the veil" of corporate personality will be considered in connection with Jhering's theory of the juristic person. It is resorted to in order to prevent frauds or to take account of economic interests which the law seeks to secure. It is significant that he feels American writers often carry this too far and that the Supreme Court of the United States has been carrying it further still.¹⁶⁵

On the other hand, Wolff admits that the fiction theory, even as he remakes it, has "some seeming defects and one real defect."¹⁶⁶ One objection which has been urged is that it is not consistent with the idea of rights, since, it is said, we can only speak of a right when an interest is protected by law in such a way that making it effective depends on the will of a human being. But, as Gray points out, we attribute rights to an insane person bereft of will, to an idiot, and to a babe in arms, although they cannot exercise the rights themselves and the will is supplied by others.¹⁶⁷ Moreover, it is enough to have a theory consistent with imputing legal rights to legal persons. Another objection has been made to the effect that

164. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 512 ff.

165. See *infra* (e).

166. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 507.

167. *Nature and Sources of the Law* (2 ed. 1921) 38.

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the fiction theory leads to unfortunate political results. For example, confiscation of church property has been justified by arguing that as ecclesiastical bodies were fictitious beings deriving their existence and legal capacities from the state, they could be deprived of legal existence and capacities by the same authority. Their property then became *bona vacantia* and passed to the state.¹⁶⁸ To this it is answered that it is not for a theory of juristic persons but for the law to say who shall succeed to the property of an extinct legal unit. I am not impressed by this answer. If apart from the creative action of the state there is nothing, if the property is held by a fictitious entity, so that when the fiction is put an end to no pre-existing *de facto* entity which the law had clothed with a legal personality remains, why should not the state succeed? Wolff suggests that as on death of a human being the law only appoints the state as successor when there are no near relatives, it would be just when a juristic person ceases to exist the persons most nearly connected with it should succeed, such as the members or persons designated by the articles of association or by the founder.¹⁶⁹ But this reasons from the fiction itself to uphold the fiction theory. The juristic person is a fictitious person; therefore the principles of succession to natural persons should govern. In the Mormon Church case the

168. 2 Michoud, *Théorie de la personnalité morale* (2 ed. 1922) no. 333.

169. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 508.

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Supreme Court of the United States held that on annulling of the charter of the church corporation the legal title passed to the United States, but, as the property had been given for religious purposes either Congress or a court of equity in its jurisdiction to administer charities could provide for application of it to uses as near as might be to proper uses such as were originally declared.¹⁷⁰ In other words, charity was the beneficiary but not the owner. Wolff is thinking in terms of *droit*, *Recht*, with the ethical implications of those words rather than of "law" as something proceeding from the state. Another objection much urged is that the fiction theory is incompatible with free exercise of the right of association, a fundamental tenet of liberalism. Wolff is quite right in saying that those who make this objection confuse state and law. The state may not create an entity as such. But whether an entity which exists *de facto* shall have legal personality is a matter for the lawmaking organ of the state. The law will look to the state to determine what is an entity for the law. This does not wholly dispose of the objection, however. The close relation of the fiction theory to the concession theory, which has been said to be its backbone¹⁷¹ helps maintain traditional jealousy of associations by promoting an idea that conceding a fictional existence

170. *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 47-56 (1890).

171. Hallis, *Corporate Personality* (1930) 9-11. See also Maitland's *Introduction to Gierke, Political Theories of the Middle Age* (1900) xxxviii.

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to something otherwise non-existent is some sort of exceptional special privilege. The natural-law way of putting this, that an artificial entity not a human being is given personality by positive law, has made itself felt in the anomalies of Anglo-American law of voluntary associations. Michoud argues that the state itself cannot derive its personality from the state.¹⁷² Wolff says that this is based on confusion between the state and the law.¹⁷³ But there is still the idea of a fictitious entity created by the state through the positive law with reality only in the natural person.

In this connection one should note the argument of Taney, C. J., in the *Dred Scott Case*¹⁷⁴ and of Cobb on Slavery,¹⁷⁵ that a free negro got his personality from the state and was to be ignored by the law except as the state might concede him some personality. The fiction theory has led to such things. Indeed, Taney uses the analogy of a corporation in his argument. Nowadays we are constrained to think of juristic persons as contracting or committing torts and even crimes through their boards or appropriate organs, as capable of being injured in their honor or reputation by slander and libel, as capable of personal appearance in court, and much more of the sort. The close relation of the concession idea to the fiction theory has stood in the way of recognizing this. Gray speaks of getting down "to the hard pan of fact."¹⁷⁶ But in a time when unincorporated

172. Michoud, *La personnalité et les droits subjectifs de l'état dans la doctrine française contemporaine*, *Festschrift für Gierke* (1911) 493, 495.

173. *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 509.

174. *Dred Scott v. Sandford*, 19 How. 393, (U.S.) 407 ff., 15 L.Ed. 691 (1856).

175. Cobb, *Law of Negro Slavery* (1858) chap. 22.

176. *Nature and Sources of the Law* (2 ed. 1921) 51.

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organizations of workers can paralyze the industries of a great nation and tie up the transportation of a metropolitan city, when they may with impunity enter into combinations in restraint of trade for which individuals and corporations are liable, when they may commit trespasses and organized assaults and batteries and destruction of property with impunity and may coerce others into joining them—when associations of men are so significant in our economy that the legal order must do something about them or give up its task of social control—to speak of associations as abstractions and of legal treatment of them as legal units as fiction, is a very unreal type of realism.

(c) *The organism theory.* In the beginnings of law the group was more significant than the individual man, and groups and associations have been thought of as units and on the analogy of the individual from the time jurists had to think about them. In Roman law the juristic person was called *corpus*,¹⁷⁷ and our terminology follows this. The body has members (literally limbs), a head, and organs. In the Middle Ages a theory of the juristic person as an organism was an older rival of the fiction theory. Just as the concession theory was combined with the will jurisprudence of the nineteenth century, so the organism analogy in that century called for a will. On the one hand, the will idea led to a theory that a group or association which had no will could only have a fictitious existence. On the other hand, it led to the proposition that as groups and associations were realities they must have wills. It might be said that one type of thinker

177. Dig. 3, 4, 1; 34, 5, 20; 47, 22.

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found a fictitious person. The other found a fictitious will.

According to the organism theory the subject of a right (in the wider sense), the holder of an interest recognized and secured by law, need not be a human being. Every being which has a will and life of its own may be a subject of rights. It holds that states and municipalities, and incorporated associations, and foundations, are real beings, alive and with wills. The legal person is a real person. Associations are social organisms just as human beings are physical organisms. They have a will distinct from the will of the members. What they do they do themselves through their organs not through guardians as in the case of infants or lunatics.

In the era of the biological sociology, when the terminology of biology was applied to politics and jurisprudence and the phenomena of the social sciences were interpreted in terms of the Darwinian struggle for existence and evolution¹⁷⁸ there was a tendency to carry on an anthropomorphic organismic terminology to an extreme, which has served to discredit the entity idea. As Wolff puts it, the conception of a social organism was held not to be mere imagery, it was reality.¹⁷⁹ Just as the combined concession and fiction theories led to fallacious legal arguments, ignoring realities, so the organismic theory combined with the entity theory led to unsatisfactory judicial reasoning, in each case because dogmatic fictions were taken too seriously. Wolff

178. See Pound, *The Scope and Purpose of Sociological Jurisprudence* (1912) 25 *Harv.L.Rev.* 489, 495-500, 502-503.

179. Wolff, *On the Nature of Legal Persons*, (1938) 54 *Law Quart.Rev.* 494, 499.

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gives a good example, where however, a sound result was reached by curious reasoning. In 1907, a German American company belonging to the Standard Oil organization and a German oil selling company made a contract by which, while the individuality of each company was maintained, the German company was made wholly subservient to the German American company, which was to have the sole power of selecting and fixing the number of managers and department managers of the German company, and to employ and dismiss them and all other employees and to have full and free power of disposing of its personal property. The German Supreme Court said that this degraded the German company "to the position of a tool, with no will of its own" and that it was opposed to the German conception of *boni mores* "that one party to a contract should be so effectively tied up by the other." Hence the contract was held void.¹⁸⁰ But while the reasoning that the subsidiary, a real person, is "made to live the life of a slave" does not appeal to us, American courts and legislators have had to reach like results on grounds of public policy in case of voting trusts,¹⁸¹ and holding companies.¹⁸² Moreover there is, as the sociologists argue, a distinction between the aggregate of a thousand wills of a thousand members and the will of the organized thousand. Wolff says that the collective will of the thousand is only the "mutually influenced individual wills."¹⁸³ Yet it may be the result of compromises and may not coincide with the individual will of any member. Nor is it a mere figure of speech to think of political

180. *Deutsch-Amerikanische Petroleumgesellschaft v. Deutsche Petroleum-verkaufsgesellschaft m.b.H.*, 82 *Entscheidungen des Reichsgerichts, Zivilsachen*, 308, 313-314 (1913). See Wolff, *supra* note 179.

181. *Warren v. Pim*, 66 N.J.Eq. 353 (1904).

182. *Public Utility Holding Company Act* (1935) 49 Stat. 838, 15 U.S.C.A. § 79; *Electric Bond & Share Corp. v. Securities & Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105 (1938).

183. *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 501.

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and ecclesiastical organizations, of universities, of clubs, and of great banking, industrial and public service companies as having what may not unreasonably be called life. The difficulty comes with respect to companies which are mere business devices, and is analogous to the one encountered by the theory of the natural person in case of the idiot and the demented.

In Continental law as well as in Anglo-American law the one-man corporation is a not uncommon phenomenon. On the Continent, dummy corporations of the sort have been used to evade legislation limiting the number of votes which a shareholder may cast and to evade certain taxes,¹⁸⁴ where American courts would disregard the corporate form. But there are cases where corporations with a single shareholder have a legitimate function as a business device.¹⁸⁵ In such cases, where one corporation owns all the shares in another, our American bankruptcy law and practice allow bringing the assets of the subsidiary into the bankruptcy of the dominant company.¹⁸⁶ There are clearly cases where for good business or economic reasons one man or one company may own all the shares in or otherwise completely control another. In other words, there is no association. One legal person is the sole component of the other and each is legally distinct. Obviously the organism theory is unequal to such a situation.¹⁸⁷

If the fiction theory alone seems to apply to corporations as mere business devices, some theory of the reality

184. Ibid. 503-504.

185. Ibid. See also Hallstein, *Die Aktienrechte der Gegenwart* (1931) 235.

186. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219, 61 S.Ct. 904, 907, 85 L.Ed. 1293 (1941); *Trustees System Co. of Pennsylvania v. Payne*, 65 F.2d 103 (C.C.A.3d, 1933).

187. A typical case of a one man company is *Macaura v. Northern Assurance Co.*, [1929] A.C. 619.

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of groups and associations seems best suited to the usual "corporation aggregate." Gray considers that in the case of the state, city, tribe, college "personification of an abstraction" and "giving to it human beings as organs, seems a necessity of human existence."¹⁸⁸ Organized "bodies" of human beings are as hard to make into "abstractions" as one man company business devices are hard to make into "living realities."

(d) *The group personality (realist, sociological) theory.*¹⁸⁹ Wolff seeks to "salvage" the fiction theory by jettison of its acquired features of the concession and will theories.¹⁹⁰ In the same way we might salvage the sociological theory by jettison of the features of an organism theory and the will theory which it has acquired or which have been attributed to it. We may accept from other social sciences that association is a social reality. When recognized by law it becomes a legal reality and juristic personality is a technical expression for this reality. Gierke pruned the organism theory of its inherited anthropomorphic extravagances, but writing in the era of the will jurisprudence was compelled by the mode of thought of the time to attribute will to any entity which

188. *Nature and Sources of the Law* (2 ed. 1921) 69.

189. Lord Wright, *The Common Law and its Old Home*, Harvard Tercentenary Publications, *The Future of the Common Law* (1937) 73-74; Pollock, *Has the Common Law Received the Fiction Theory of Corporations*, *Essays in the Law* (1922) 151.

190. See *ante* note 150.

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the law recognized as having interests to be secured.¹⁹¹ Hence there is pruning still to be done. The nineteenth-century philosophical jurisprudence called for metaphysical ideas as to the nature of corporate personality which contended with insistent economic and social demand for recognition and securing of the interests of organizations and associations which are involved in all social life and necessary in a complex industrial society. As the fiction theory has been used to restrict the powers of corporations, the sociological theory has been made the basis of contention that the widest extension of legal personality should be made to associations and the widest powers conferred upon them when incorporated.

Paton, with good reason, styles the group personality theory the "realist theory."¹⁹² It is realist in the sense that its real (i.e. significant) personality is the group apart from attributing of legal personality to it by the state. But it is not the theory of the neo-realist jurists.¹⁹³ It may well be called the sociological theory since it builds on Gierke and Ehrlich and Hauriou.¹⁹⁴ As with any proposition of the sort, there are degrees of reality or significance. Maitland says: ". . . a man thinks of his

191. The dates are: *Das deutsche Genossenschaftsrecht*, vol. I, 1868, vol. II, 1873, vol. III, 1881, vol. IV, 1913; *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (1887); 1 *Deutsches Privatrecht* (1895) 456-660; *Das Wesen der menschlichen Verbände* (1902).

192. *Jurisprudence* (1946) 268-270 (2 ed. 1951) 332-334.

193. *Ante*, chap. 5.

194. See *ante* §§ 25, 27.

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club as a living being, honorable as well as honest, while the joint stock company is only a sort of machine into which he puts money and out of which he draws dividends.”¹⁹⁵ But we have had to recognize that a corporation’s honor and reputation for honesty must be secured against defamation.¹⁹⁶ Also Lord Maugham was disinclined to apply in favor of a corporation the equitable doctrine as to clogging the equity of redemption, saying that there was less likelihood of a company being oppressed by clogging the equity of redemption than there is in the case of an individual.¹⁹⁷ But this does not mean that a corporation cannot be coerced into unfair terms in a loan of money. Lord Maugham, as the context shows, was construing a statute and considered upholding freedom of contract in commercial transactions more important than preventing unfair bargains where there was little risk of them.

As to objections urged against the sociological theory, Wolff asks whether a promise by a company to dissolve itself should be unenforceable as being a promise to commit *felo de se*.¹⁹⁸ Equally one might ask as to a promise to enter a religious order where that involved civil death. There is no policy of the law against dissolution of a corporation comparable to that against

195. Maitland, *Trust and Corporation*, 3 *Collected Papers* (1911) 321, 383.

196. *Finnish Temperance Society Sovittaja v. Finnish Socialistic Pub. Co.*, 238 Mass. 345, 130 N.E. 845 (1921).

197. *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1940] A.C. 613.

198. Wolff, *On the Nature of Legal Persons* (1938) 54 *Law Quart.Rev.* 494, 501.

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suicide. Also he puts the case of a corporation acquiring some of its own shares and puts the question, how can a living body be one of its own members?¹⁹⁹ One might add that a man may own stock in a dozen corporations and so be a member of each at the same time. If one takes the term member literally as "limb" and thinks literally of a "body" these cases may be puzzling. Hauriou gives us the answer. The association does not swallow up the member nor merge his personality. It organizes certain of his activities. The sins of the extreme organismic theory are no more to be visited on a sociological theory than those of the extreme concession theory on the fiction theory.

Thurman Arnold²⁰⁰ complains of the bad results which he considers have followed "from the tendency to treat great industrial combines as real persons whose liberty and dignity must be defended." He adds: "Constitutional provisions designed to protect the personal rights of the American citizen²⁰¹ were pressed into service to protect the freedom of huge enterprises which tyrannized over the consumer. Freedom of great enterprises from restraint was dramatized as individual freedom." This is plausible but superficial. Partly the decisions complained of were application of the standard of reasonableness as if it were a rule of property. Chiefly (for the decisions antedate any currency of other than the concession and fiction theories in this country) they resulted from consciousness that when the property of an incorporated enterprise was confiscated or the enterprise was dealt with arbitrarily and unreasonably, whatever the theory of a corporation, those whose means were invested in the enterprise or whose activities were organized in it, would suffer individually.

199. *Ibid.* 511.

200. *The Folklore of Capitalism* (1937) chap. 8.

201. This is a questionable assumption. The V and XIV amendments secure "persons," not "citizens."

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Wolff says that we are lawyers, not sociologists.²⁰² One might add that we are jurists, not metaphysicians, no more bound to philosophy than to sociology. He argues from ethical and metaphysical ideas of personality.²⁰³

What has subjected the fiction theory to crucial trial and made for acceptance of a modified personality theory in England is the "migrating foreign corporation." Under the concession-fiction theory a corporation had no existence beyond the boundaries of the sovereignty which created it.²⁰⁴ But the necessities of business and industry which refuse to be confined within political boundaries have compelled recognition that in dealing with the foreign corporation we have to do with something more than a fiction. It has been said truly enough that the actual judicial treatment of foreign corporations as entities rather than abstractions is dictated by common sense and common convenience and the practical needs of business rather than deduced from any particular theory.²⁰⁵ The result, however, is that the idea of a group or association as a real, not fictitious, entity makes its way because it accords with social and economic facts.²⁰⁶ Dissolution

202. On the Nature of Legal Persons (1938) 54 Law Quart.Rev. 494, 502.

203. Ibid. 506-507.

204. Taney, C. J. in *Bank of Augusta v. Earle*, 13 Pet. 519, 538, 10 L.Ed. 274 (1939).

205. Paton, *Jurisprudence* (1946) 276. Not in second edition.

206. See Henderson, *Position of a Foreign Corporation in American Constitutional Law* (1918) 48; Foley, *Incorporation, Multiple Incorporation, and the Conflict of Laws* (1929) 42 *Harvard Law Rev.* 516, 517-520, 547-549;

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in Russia of Russian corporations trading in England brought this out particularly. The legal personalities created by Russian law came to an end and the English branches went with them.²⁰⁷ How then could the affairs of those dead branches be wound up? Theories could not stand in the way of such a practical problem. A basis was found in legislation as to winding up of unregistered companies for bringing the dead branches to life for the purposes of winding up.²⁰⁸ The dissenting Lords of Appeal considered that there were logical difficulties in the way. But the difficulties flowed from the fiction theory. The association as a *de facto* entity had lost its Russian legal personality. But so long as its British affairs remained to be wound up, the *de facto* entity subsisted and could be recognized and wound up as such. "The theory of a fictitious personality applied to the status of migrating corporations leads to conclusions which are in conflict with common opinion and common sense, and, if we reject them, we are accepting the theory of a real personality." ²⁰⁹

Young, *The Legal Personality of a Foreign Corporation* (1906) 22 *Law Quart. Rev.* 178; Farnsworth, *The Residence and Domicil of Corporations* (1939) 56-58, 298-312.

207. *Russian & English Bank v. Baring Bros. & Co., Ltd.*, [1932] 1 Ch. 435, 440; *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289, 297.

208. *Russian & English Bank v. Baring Bros. & Co., Ltd.*, [1936] A.C. 405, 425, 437.

209. Young, *The Legal Personality of a Foreign Corporation* (1906) 22 *Law Quart. Rev.* 178, 189.

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In philosophical discussions "real" not uncommonly means "significant." At any rate there is something juristically significant in the legal personality of a corporation.²¹⁰

(e) *Jhering's (the "bracket") theory.*²¹¹ In this theory of incorporated associations (happily called by Maitland the bracket theory)²¹² the members of an incorporated association are considered the bearers of rights and as bound by the duties which for convenience are referred to as the rights and duties of the corporation itself. It is argued that where there are a number (sometimes a very large number) of members, as it is inconvenient and often impossible always to refer to all of them individually, as it were, a bracket is put around their names and given a name of its own. But the real and only persons are the members. The juristic person is but a convenient mode of referring to them. In order to get at reality we must erase the bracket.

Jhering begins by putting as a principle that every private right exists to assure some advantage to man. The true beneficiary of every right is man. It is, therefore, he goes on, indisputable that the rights which are the patrimony of a juristic person profit the several members, present or

210. See Hallis, *Corporate Personality* (1930) 240.

211. 1 Jhering, *Geist des römischen Rechts* (7 & 8 ed. 1924) 202, 22^d id. 367, 31^d id. 224, 336. See also Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 197.

212. Introduction to Gierke, *Political Theories of the Middle Age* (1900) xxiv.

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future of the corporation. The several members are the true beneficiaries of the juristic person. The juristic person, he says, as such, is incapable of enjoying rights; it has neither interests nor end; it cannot, therefore, have rights: which are not possible except where they attain their purpose, that is, where they can be useful to those having the right. "A right which can never attain this end is a chimera, irreconcilable with the fundamental idea of the principle of right and law." He proceeds to say that the apparent subject of right hides the true subject. "When one loses sight of this fundamental idea of right and law that man alone is the beneficiary of rights, he does not stop in the path of personification." He begins by personifying the dominant property in a predial servitude ²¹³ and even goes so far as to personify instruments payable to bearer. He insists that the juristic person is nothing but a special form in which the members manifest their relations of right and law with the outside world.²¹⁴

This, if at all sound, can have only restricted application either in Anglo-American law or in the law of Continental Europe. Generally a clear distinction is made between the property, rights, and duties of the corporation and those of the individual members as such. There is no question that members as such, even in a one-man company, have no title to the corporate property. They cannot insure it, convey it or incumber it in their own names. In case of injury to the corporation, even where the injury has affected the interests of stockholders, restitution or redress must be sought through the corpora-

213. E. g. 2 Austin, *Jurisprudence* (1885) 818.

214. 31 *Geist des römischen Rechts* (5 ed. 1906) 356-358.

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tion.²¹⁵ A restrictive covenant not to transfer to a colored person has been held not broken by conveyance to a corporation composed of colored persons.²¹⁶ Again, in order to locate a mining claim the locator had to be either a citizen of the United States or must have declared his intention to become a citizen in the manner provided by the naturalization laws. But a domestic corporation could locate notwithstanding there were alien shareholders.²¹⁷

On the other hand, there are cases, and they have become somewhat numerous in the United States in recent years, in which it becomes necessary to look behind the corporate entity to the actual beneficiaries.²¹⁸ In general, where a corporation seeks relief in equity and it appears that to grant it would result in unjust enrichment of or inequitable benefit to the stockholders, who will be

215. *Salomon v. Salomon & Co.*, [1897] A.C. 22, 33, 42-43, 56; *Macaure v. Northern Assurance Co.*, [1929] A.C. 619; *Humphreys v. McKissock*, 140 U.S. 304, 11 S.Ct. 779, 35 L.Ed. 473 (1891); *Wheelock v. Moulton*, 15 Vt. 519 (1843); *Smith v. Hurd*, 12 Met. (Mass.) 371, 385 (1847); *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S.W. 209, 31 L.R.A. 706 (1896); *Button v. Hoffman*, 61 Wis. 20, 20 N.W. 667 (1884); *Spurlock v. Missouri P. R. Co.*, 90 Mo. 199, 2 S.W. 219 (1886).

216. *Peoples Pleasure Park Co. Inc. v. Rohleder*, 109 Va. 439, 61 S.E. 794, 63 S.E. 981 (1908).

217. 1 Lindley, *Treatise on the American Law Relating to Mines and Mineral Lands* (3 ed. 1914) §§ 223, 226.

218. See Wormser, *Disregard of the Corporate Fiction* (1927); Ballantine, *On Corporations* (rev. ed. 1946) 290-323; Stevens, *Handbook on the Law of Corporations* (1936) 88 ff.; Anderson, *Limitations of Corporate Liability* (1931).

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the real beneficiaries;²¹⁹ or the corporate entity is being used to perpetrate a fraud on the creditors of a dominant stockholder;²²⁰ or a corporation is seeking to carry on through a subsidiary what it is forbidden to do itself;²²¹ or the corporation is set up and used to evade the law;²²² or it becomes necessary in order to get at the real intent of a transaction to consider the ultimate intended beneficiaries;²²³ or during war it becomes necessary to look to the alien shareholders of a domestic corporation;²²⁴ the courts have looked through the corporate entity to the individuals behind it. An interesting case has been discussed arising out of a doctrine of the Roman and civil law as to revocation of gifts for ingratitude.²²⁵ Suppose after a gift to the corporation a meeting of the members unanimously adopted a resolution libeling the donor.

219. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 670, 93 N.W. 1024, 1034, 60 L.R.A. 927 (1903).

220. *First Nat. Bank v. Trebein*, 59 Ohio St. 316, 52 N.E. 834 (1898).

221. *United States v. Lehigh Valley R. Co.*, 220 U.S. 257, 31 S.Ct. 387, 55 L.Ed. 458 (1911).

222. See Paul, *Studies in Federal Taxation* (1937) 20, n. 30, 69, 70; 1 Jaeger, *Kommentar zur Konkursordnung* (6 & 7 ed. 1931) § 31, n. 30.

223. *Cayuga Indians Case*, Hudson, *Cases on International Law* (2 ed. 1936) 32, 34-35; *Zigarettenfabrik Kadda Case*, 98 *Entscheidungen des Reichsgerichts in Zivilsachen*, 289 (1920).

224. *Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd.*, [1916] 2 A.C. 307. Compare *Fritz Schulz, Jr. Co. v. Raimes & Co.*, 100 Misc. 697, 106 N.Y.S. 567 (1917), where "nearly all the shareholders were alien enemies, but a majority of the directors and the managing director were residents of the United States."

225. Cod. 8, 55, 10; French Civil Code, art. 955, § 2; German Civil Code, § 630; Italian Civil Code, art. 1081.

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Wolff thinks the donor should be allowed to revoke,²²⁶ but thinks this result unlikely. This ignoring of the corporate personality is sometimes required by practical considerations. But is something that should be done with caution and on clear grounds.

As set up by Jhering and as developed in France by Vareilles-Sommières²²⁷ the beneficiaries of foundations are the true subjects of the rights we attribute to the foundation. But what shall we say in the case of such a corporation as the Carnegie Endowment for Peace? Beyond the situations described above where we must look to the actual ultimate beneficiaries, Jhering's theory does not commend itself.

(f) *The form of ownership theory.* This theory, elaborated by Planiol,²²⁸ is a form of one developed by Brinz,²²⁹ Demelius,²³⁰ and Bekker.²³¹ With them it proceeds also on the proposition that only human beings can have rights and holds that the so-called juristic person

226. On the Nature of Legal Persons (1938) 54 Law Quart.Rev. 494, 515.

227. Les personnes morales (1902).

228. 1 Traité élémentaire de droit civil (12 ed. 1932) nos. 3005-3016.

229. 2 Pandekten (1 ed. 1860) 984-947, 1 id. (2 ed. 1873) §§ 59, 61, based on Jhering's proposition that only human beings can have rights and on the Roman idea of *res universitatis*. See Beseler, Romanistische Studien (1926) 46 Zeitschrift der Savigny-Stiftung, romanistische Abteilung, 83.

230. Demelius, Ueber fingirte Persönlichkeit (1861) 4 Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, 113-158.

231. Zur Lehre vom Rechtssubjekt (1873) 12 Jherings Jahrbücher für Dogmatik, 1-135.

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is not a person at all but is subjectless property destined for a particular purpose (*subjektloses Zweckvermögen*). Planiol rejects this last formula, saying that subjectless rights are "legal monsters."²³² He considers that "fictitious personality is not an addition to the class of persons; it is a manner of possessing goods in common; it is a form of ownership."²³³ He distinguishes collective ownership (*propriété collective*) from undivided co-ownership (*propriété indivise*), the latter being a form of individual ownership. "Collective ownership," he says, "suppresses the autonomy of the individual shares." It is thus, he tells us, that "the entire nation profits by the power of its ironclads and fortresses, although citizens individually have neither use nor possession of them and many have never seen them."²³⁴ His argument deserves to be quoted: "How is it that this phenomenon, so old and so general, passes so to speak unnoticed and that in reading the treatises on law one meets only exposition and study of one species of ownership, the ownership of a field or of a house belonging to a particular individual? It is because the persistence to our times of collective ownership is, so to speak, hidden from our eyes by the existence of fictitious beings to which we ascribe, at least in a certain measure, the attributes of personality, which are reputed owners, creditors or debtors, which make con-

232. 1 *Traité élémentaire de droit civil* (12 ed. 1932) no. 3005, n. 1.

233. *Ibid.* p. 1047.

234. *Ibid.* no. 3005.

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tracts, and sustain legal proceedings like true persons. . . . All collective ownerships are attributed to fictitious persons, of which each is reputed the single owner of a mass of goods, and thus collective ownership appears as itself an individual ownership; a conception as false as useless. Consequently, instead of teaching that we have two kinds of ownership, it is taught that there are two kinds of persons.”²³⁵

French writers say “moral persons” or “civil persons.” The Germans, and others following them, say “juristic persons.” Planiol, if they are to be called “persons” at all prefers “civil persons.” He adds that *établissements* is frequently used to designate “masses of goods and the pretended person which represents them.”²³⁶ The older French writers used the term *communautés*,²³⁷ and went no further than to say that these corps or *communautés* were considered “as taking the place of persons” (the words of the Roman books) and that they were “intellectual beings” which could like persons acquire, alienate, contract, and plead.²³⁸ Bourjon says: “The goods of a *communauté* do not belong to the individuals who compose it but to the *communauté*, which in its nature

235. Ibid. no. 3007.

236. Ibid. no. 3008.

237. Pothier, *Traité des personnes*, pt. 1, tit. 7, 8 *Oeuvres de Pothier* (ed. Dupin 1825) 84-95.

238. Ibid. 84.

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is perpetual if the prince does not suppress it.”²³⁹ The term “civil person” was first used in French legislation in 1884. Before that time the texts seem to have been careful to avoid that expression. They usually said “*établissements publics*” or spoke of goods which did not belong to individuals. But the term “civil persons” occurred frequently in the judgments of the Court of Cassation.²⁴⁰ The term “civil persons” is in line with the ordinary Roman distinction between the natural and the civil. But why should the French more commonly say “moral persons?” It is because *moral* is also used to mean “mental.” So it is like the “intellectual persons” of whom Pothier wrote. The meaning is, person in the mind, not in fact.

Planiol attacks vigorously both the fiction theory and the organism theory.²⁴¹ His conclusion is that so-called juristic persons are not persons even by way of fiction; that there is no need of a second category of persons non-existent in nature in order to understand another form of ownership which is an evident fact. He argues that if we give up the fiction of personality a multitude of difficulties vanish. He considers that liability of the association as distinct from its members, for torts, for crimes punishable by fines, upon contracts, and to

239. Bourjon, *Le droit commun de la France* (1747) liv. 1, tit. 4, chap. 1, § 3, no. 12.

240. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 3012.

241. *Ibid.* no. 3016. But what he says is more a criticism of the fiction theory than of Gierke's view.

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make restitution of what it acquires, *ultra vires*, is simply liability of the mass of property. But the powers of an incorporated association are not so easily disposed of in this way. His theory is at its best in connection with foundations and endowments, regarded as juristic persons in Continental Europe where we resort to trustees.

In France, in order to be public the *établissement* must be "a mode of action of public authority" (e. g. with us the RFC?). Any other *établissement* can only be private because it is one of the forms of energy and initiative of private citizens acting on their own account.²⁴² With us the significant classification would be: (1) the state as guardian of social interests—regulating the use or appropriation of but not owning *res communes* and *res nullius*, and regulating the use of public roads and *res extra commercium*, where there is no ownership; (2) the state as a property owning, contracting, even on occasion wrong-doing juristic person—owning public domain (as in Texas²⁴³), conducting enterprises, and made liable for injuries to individuals by its agents acting within the scope of their employment; (3) corporations set up by the state for carrying out services it undertakes to render; (4) private corporations for carrying on public service (e. g. a railroad company); and (5) incorporated companies for carrying on private undertakings. At least the first cannot be made to fit Planiol's ideas of the juristic person as a form of ownership. Ownership of a navigable river is as much a fiction as juristic personality can be. There is a distinction between property owned by the state as a juristic person, as to which there is *ius disponendi*, and property as to which the state

242. Ibid. no. 3020, quoting 1 Aucoc, *Conférences sur l'administration et le droit administratif* (3 ed. 1885) no. 199, p. 351.

243. Constitution of Texas, art. 14.

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as guardian of social interests has what is called ownership, which is *imperium*, not *dominium*. As to the former Planiol's theory is applicable. As to the latter the Roman category of *res extra commercium* may be suggested.

(g) *Kelsen's theory.* Kelsen²⁴⁴ makes a purely formal approach, arguing that there is in essence no difference between the *legal* personality of a company and that of an individual. Personality in the legal sense is only a technical personification of a complex of norms, a focal point of imputation which gives unity to certain complexes of rights and duties. More or less arbitrarily the law individualizes certain parts of the legal order, establishing a certain unity in the rights and obligations pertaining to them. But this is only a technical means of bringing about facility of procedure. What is real is an item of individual human behavior, since the behavior of men is the object of legal norms and so of rights and obligations. When the legal order confers rights or imposes obligations on a juristic person this means that it makes a right or an obligation of an item of human behavior, without itself determining the subject of the behavior. Determining of this subject in such case, in virtue of a delegation from the total legal order (that of the state) falls upon the partial legal order the unity of which is expressed in the idea of the legal person. The legal person is no more a superman than the physical person is a

244. Droit et état du point de vue d'une théorie pure (1936) 2 Annales de l'Institut de droit comparé de l'Université de Paris, 17, 25-31.

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man. The obligations and the rights of a legal person resolve themselves into obligations and rights of individuals, that is, into norms which rule the conduct of individuals.²⁴⁵ He asserts that this is the only approach for a pure science of law and that it has the advantage of avoiding futile arguments as to the psychological and philosophical nature of personality. It seems at first view an example of a pure science of law which attains purity by excluding all the difficult problems which make a science of law necessary or at least worth while. But, if I understand Kelsen aright, there is at bottom a sound idea. When we look at the several theories of juristic personality in detail it appears that the concession theory expresses the undoubted fact that what shall be a legal unit is determined by the law proceeding from a lawmaking organ of the state. The fiction theory meets squarely incorporated companies which are mere business devices with no reality of association. The entity theory meets the case of associations with an independent origin and real existence recognized by the law. Jhering's theory explains best the cases where it becomes necessary to distinguish from the legal person the ultimate beneficiary or beneficiaries of its activities. The form of ownership theory meets best the personified masses of property which in Continental Europe are treated as corporations, where in Anglo-American law we resort to trustees. Kel-

245. Ibid. 26-27.

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sen expresses well the significant idea that legal personality is only a convenient juristic device by which the problem of organizing rights and duties is considered.

Nékám has put this in another way.²⁴⁶ Instead of a single category of legal "persons," in principle all of like legal importance, we have to consider a variety of legal units in a scale from some with but one potential right (in the broader sense) to others which by reason of greater social or economic importance have many rights, powers, liberties, and privileges attributed to them and duties imposed on them. Securing of the interests of the individual human being, as well as of those of groups and associations and the other entities to which legal personality is attributed, depends on the valuing of his social importance in the time and place.²⁴⁷ Whatever is treated as a legally significant entity by attributing or giving to it any of the juristic conceptions involved in the term "a right" in its broadest sense is a legal unit. But the terms person and personality have been used so long that we can hardly hope to persuade lawyers and law teachers to give them up. The most we can do, perhaps, is to get rid of the natural-law, metaphysical, and psychological ideas of personality which have attached to the legal conception of a legal unit and realize that we are speaking of a legal conception and nothing more.

246. Nékám, *The Personality Conception of the Legal Entity* (1938).

247. *Ibid.* 218-241.

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§ 125. STATUS AND CAPACITY.¹ 1. *Status*.²

As one of the controverted questions of analytical jurisprudence, the question, what is status? is a case in point for Kantorowicz's gibe, *Rechtswissenschaft ist Wortwissenschaft*. Because of the medieval idea that the *Corpus Iuris* had binding authority, and the later idea that the Roman law was embodied reason, any term in the Roman law books came into modern law books and jurists were busied to find and give it a modern meaning. As the term status was found in the modern books jurists assumed that it expressed an authoritatively given necessary fundamental idea which had to be clearly defined. Analytically, to Austin, it has to do with method and classification only.³ From a sociological standpoint it can be used for a significant feature of a kin-organized society which, persisting into politically organized society, is limited and developed to serve purposes of protecting against weakness and lack of judgment and safeguarding exercise of

1. Maine, *Ancient Law* (Pollock's ed. 1906) 172-174 and Pollock's note, 183-185; Holland, *Jurisprudence* (13 ed. 1924) 351-357; Allen, *Legal Duties, Status and Capacity* (1931) 28-70; Ehrlich, *Die Rechtsfähigkeit* (1909).

2. 1 Austin, *Jurisprudence*, 350-354, 2 id. 687-735 (5 ed. 1885); Salmond, *Jurisprudence* (10 ed. 1947) 256-261; Paton, *Jurisprudence* (1946) 255-260 (2 ed. 1951) 319-324; 2 Beale, *Conflict of Laws* (1935) §§ 119.1-120.15; American Law Institute, *Restatement of Conflict of Laws* (1932) §§ 119-120; Cleveland, *Status in Common Law* (1925) 38 *Harvard Law Rev.* 1074; Starke, *A Note on Status* (1938) 54 *Law Quart. Rev.* 400; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 419-423, 427-428; 1 Josserand, *Cours de droit civil français* (2 ed. 1932) nos. 213-250; Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 152-170.

3. 2 Austin, *Jurisprudence* (5 ed. 1885) 687, 722-723.

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powers involving public interests but exciting jealousy or inviting interference. In the civil law and in the conflict of laws a broader meaning of position before the law and a narrower one of relational position have become current. The term has been given so many senses and has been in general use with such elasticity of meaning that it is unprofitable to seek to unify all the meanings or to seek to discover an exact meaning in Roman law and hold it to that meaning.

Buckland says truly that the term *status* "has no very precise meaning in the Roman books."⁴ When precisely used it seems to be equivalent to *caput*, the different constitutive attributes of legal personality. The legal personality of an individual was only complete as he was free, a Roman citizen, the head of a household.⁵ As all men are free in modern law, French jurists hold that *status* (*état*) is "the position of the individual considered as member of a political group called nation and of a determined family."⁶ But they often use the term in a sense of condition or quality having to do with capacity.⁷ Of the three kinds of *caput* in Roman law, the first suggests position before the law and civilians say *status libertatis*. The second suggests political position and they say *status civitatis*. The third suggests household position and they say *status familiae*. But the second and third suggest relational position, while the third suggests condition as to capacity. Thus according to the exigencies of different times and different systems of law, the term

4. Buckland, *Text Book of Roman Law* (2 ed. 1932) 59 n. 3.

5. *Dig.* 4, 5, 11.

6. Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 152-155.

7. *Ibid.*

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got different and only somewhat related meanings. Attempts to unify them by ideas of quality, or of condition, or of relation have not succeeded.

Down to Savigny's *System*, the civilians considered that status denoted a "quality by virtue of which a man has certain rights" (using "rights" in the wider sense).⁸ The qualities in question were said to be either natural or civil. The first would include "all those qualities of mankind upon which in any part of the legal system special consequences depend."⁹ Savigny pointed out that looked at in this way the doctrine of status generally merges in the doctrine of rights in the wider sense and hence is quite unnecessary.¹⁰ He defines status so considered thus: "The position or standpoint which the individual man occupies in relation to other men."¹¹ In Roman law this meaning had significance in the distinction between *status publicus* and *status privatus*, the one involving freedom and citizenship, the other position in a household. This distinction is only important in a kin-organized society or one in which there is both kin-organization and political organization. It has dropped out of use.

8. Savigny, *System des heutigen römischen Rechts* (1840) 444.

9. *Ibid.* 445.

10. *Ibid.* 445-447. To the same effect 2 Austin, *Jurisprudence* (5 ed. 1885) 719. Austin's discussion of status was before Savigny's. Austin had only the first volume of Savigny's *System*. 1 Austin, *Jurisprudence* (5 ed. 1885) ix.

11. 2 Savigny, *System des heutigen römischen Rechts* (1840) 454; Savigny, *Jural Relations* (transl. by Rattigan, 1884) 318.

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In English the best discussions are those of Austin, Salmond, and Allen building on Maine.

Austin, following Thibaut,¹² attacks the Continental terminology of status as a quality. He says that "the scholastic jurists imagined an occult quality inhering in the given person by virtue whereof he is clothed with distinguishing rights or is subjected to distinguishing duties, and to this fictitious entity (and not to those rights and duties or to the fact which begets them) the scholastic jurists gave the name of status." He adds: "The supposition that status is a quality inhering in the person is merely fictitious" and "admitting the fiction will not serve to characterize the object for the purpose of distinguishing which it is devised."¹³ He frequently refers to status as a condition.¹⁴ This is not inconsistent with his conclusion that it is an aggregate of rights and duties differing from the aggregate of rights and duties belonging to all simply in being limited to a class of persons.¹⁵ In accord with the Austinian theory of law status should be regarded as a condition imposed by law rather than as a quality recognized by law. But he thinks of a set of rights and duties as constituting the condition. "Where," he says, "a set of rights and duties specially affecting a nar-

12. 2 Thibaut, *Versuche über einzelne Theile der Theorie des Rechts* (1817) 19.

13. 2 Austin, *Jurisprudence* (5 ed. 1885) 697-699.

14. *Ibid.* 687-689, 942-944.

15. *Ibid.* 722.

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row class of persons is detached from the bulk of the legal system and placed under a separate head for convenience of exposition, that set of rights, duties, capacities and incapacities is called a status.”¹⁶ Thus its significance is as the basis of classifying the law as law of persons and law of things. That classification turns upon “the notion of status or condition or upon the notion of person as meaning status or condition.” The law of persons is the law of status and the law of things is “the law minus the law of status.”¹⁷

According to Austin there are three marks or characteristics of a status: “First, it resides in a person as a member of a class. Secondly, the rights and duties, capacities and incapacities composing the status or condition regard or interest specially the persons of that class. Thirdly, these rights and duties, capacities and incapacities are so considerable in number, that they give a conspicuous character to the individual or extensively influence his relations with other members of society.” But he holds this third characteristic is “not essential and would not be regarded in a body of law rationally constructed.”¹⁸ Austin had done much to clear up a subject much confused when he wrote. But his category took in too much. It would include along with infants and

16. Ibid.

17. Ibid. 696.

18. Ibid. 689.

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lunatics, landlords, manufacturers, and bankers. As will be seen presently, Maine, developed by Allen, has given us more satisfactory criteria. Holland saw the flaw in Austin's doctrine at this point, putting as the test: "Does the peculiarity of the personality arise from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence." The same person may be an infant and a landlord. The rights (in the wider sense) of the landlord as landlord are not affected by his being such or by his being also a merchant, while those of the infant landlord are affected by his infancy.¹⁹

Salmond considers that the term "status" has been used in four senses. First: "Legal condition of any kind, whether personal or proprietary. . . . A man's status in this sense includes his whole position in the law—the sum total of his legal rights, duties, liabilities or other legal relations, whether proprietary or personal, or any particular group of these separately considered."²⁰ Second: "Personal legal condition, that is to say, a man's legal condition only so far as his personal rights and burdens are concerned, to the exclusion of his proprietary relations." Salmond generally uses the term in that sense. He says: "So we speak of the status of a wife, meaning all the personal benefits and burdens of which marriage

19. Holland, *Jurisprudence* (13 ed. 1924) 142-143.

20. Salmond, *Jurisprudence* (10 ed. 1947) 259.

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is the legal source and title in a woman. In the same way we speak of the status of an alien, a lunatic, or an infant; but not of a land owner or a trustee.”²¹ Third: “Personal capacities and incapacities as opposed to the other elements of personal status.” That is: Not the whole sphere of personal condition but only the part of it which relates to personal capacity and incapacity. “The law of status would include the rules as to the contractual capacities and incapacities of a married woman but not the personal rights and duties between her and her husband.”²² Fourth: “Compulsory as opposed to conventional personal condition.”²³

Summarily stated Salmond’s four kinds of status, as the term has been used, comes to this: Status as position before the law, status as condition before the law, what might be called capacity status, and compulsory status. To that the civilians add an idea of what may be called relational status, of which later. But first something must be said of Salmond’s four.

Salmond’s first meaning, position before the law, refers to the standing that one has by merely being a person. It is used to mean that one is a person, as all human beings are in the eyes of modern law. Allen says with entire truth that status in this sense has no value for the law of today.²⁴

21. Ibid. 260.

22. Ibid. Compare Dicey: “Every person has a certain civil status consisting of his capacity or incapacity under the laws of his country for acquisition and exercise of legal rights (in the wider sense) and for the performance of juristic acts.” *Conflict of Laws* (5 ed. 1932) 531-532.

23. *Jurisprudence* (5 ed. 1947) 260.

24. Allen, *Legal Duties* (1931) 30-32. Starke’s criticism of Allen, pointing out that the First Committee of the General Assembly of the League of Nations

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Nor has the second of Salmond's four meanings much use in jurisprudence. It gets down to a distinction between interests which are capable of assessment in money and those which are not. There is a real distinction here which has to be borne in mind in determining what interests are to be or may be secured and how. But the term status is of no help in this connection.²⁵ Status as condition can be put in another way approaching the fourth of Salmond's meanings.²⁶

Salmond's third meaning is usual with writers on the conflict of laws.²⁷

As examples of status in his fourth sense Salmond says: "The position of a slave is a matter of status, the position of a free servant is a matter of contract. Marriage creates a status in this sense, for, although it is entered into by way of consent, it cannot be dissolved in that way, and the legal condition created by it is determined by the law and cannot be modified by the agreement of the parties. A business partnership, on the other hand, pertains to the law of contract and not to that of status."²⁸ Allen puts as Salmond's fourth sense: "Legal condition imposed

used status to mean "the sum total of the particular rights, duties, and legal relationships of a particular class." Starke, *A Note on Status* (1938), is beside the point. One could unsettle every term in the books by referring to lay usage or even to the language of the statute books.

25. See Allen's critique, *ibid.* 32.

26. I. g. Westlake: "That peculiar condition of a person whereby what is law for the average citizen is not law for him." *Private International Law* (1 ed. 1858) § 89. This often quoted formula is not in later editions.

27. Dicey, *supra* note 22. Beale retains the idea of a quality: "Status is a personal quality or relationship, not temporary in its nature, nor terminable at the mere will of the parties, with which third parties and the state are concerned." 2 Beale, *Conflict of Laws* (1935) § 119.1.

28. *Jurisprudence* (10 ed. 1947) 260-261.

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by operation of law, as distinct from rights and duties acquired by a party's own voluntary act." ²⁹

For the purposes of Anglo-American law the most useful discussion of status is that of Allen building on Maine. Maine followed Austin in applying the term only to a narrow class of persons in contrast to the older Continental usage of general position before the law. He used status to mean a legal condition imposed on the individual not of his own choice and because of circumstances beyond his control.³⁰ Developing this, Allen defines the term thus: "The condition of belonging to a particular class of persons to whom the law assigns certain peculiar capacities and incapacities." ³¹ The idea of status as belonging to a class is Austin's. The idea of capacities and incapacities assigned to the class by law is Maine's as developed by Allen. Allen rightly considers that Maine's significant contribution, however, is that status is extrinsically determined whereas agreement is self determined.³² The class is one for which rules of law attach legal consequences to a member from the mere fact that he is a member.³³ The condition affects capacity generally. It may involve capacity as well as incapacity as shown by a peer of the realm in England,³⁴ a noble

29. Legal Duties (1931) 23.

30. Maine, Ancient Law (Pollock's ed. 1906) 172-174.

31. Allen, Legal Duties (1931) 42.

32. Ibid. 41.

33. Ibid. 43.

34. 1 Blackstone, Commentaries (1765) 401-402.

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formerly in Germany,³⁵ or a diplomatic representative.³⁶ Indeed, with respect to the privileges and burdens involved in the execution of his office a public officer is in this category at common law.³⁷ Going over the whole list of incapacities or legally imposed burdens attaching irrespective of assent which are recognized or imposed by law in different lands and in different times (see below under Capacity) there are cases where status, as defined by Allen after Maine, does not arise involuntarily. Cases of this sort are coverture at common law. But however one may enter upon the class, the law imposes incapacities or privileges not proceeding from free choice and beyond reach of those who are in the class. Even where the status originates in the free voluntary act of the individual the law adds certain incapacities or capacities or burdens not to be cast off by the individual's free choice.³⁸

35. Glerke, *Deutsches Privatrecht* (1895) §§ 74 ff.; Schuster, *Principles of German Civil Law* (1907) 579.

36. He cannot divest himself of his status of diplomatic representation by his own act. His privileges are not personal to himself. He cannot waive them without the consent of the nation that sent him. *Barbuti's Case*, Cas. t. Talbot, 281, 282 (1724); *United States v. Benner*, Fed.Cas. No. 14, 568, Baldw. (U.S.) 234, 239-240 (1830); *Valarino v. Thompson*, 7 N.Y. 576, 578-579 (1853).

37. He continues to be subject to the duties and burdens of his office, may be compelled by mandamus to perform them, and is liable for nonperformance notwithstanding resignation until his resignation is accepted. Even if he chooses freely to take the office, he cannot by this free act divest himself of it. *Edwards v. United States*, 103 U.S. 471, 473-474, 26 L.Ed. 314 (1850); *Thompson v. United States*, 103 U.S. 480, 26 L.Ed. 521 (1850); *Ruffin, C. J. in Hoke v. Henderson*, 15 N.C. (4 Dev.L.) 1, 28-29 (1833); *State ex rel. Reeves v. Ferguson*, 31 N.J.L. 107, 120, 123-124 (1864).

38. This is well put by Allen, *Legal Duties* (1931) 39.

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How far understanding of status has advanced since Austin is brought out by comparison of Austin's three marks or characteristics³⁹ with Paton's five propositions based on Allen's development of Maine.⁴⁰ These are: (1) Status arises from membership in a class and the powers or capacities of that class are determined by law, not by agreement or will of the parties. This is Maine's proposition. (2) Often one is put in such a class compulsorily.⁴¹ But this is not necessarily true. It will be noted that this is more inclusive than Salmond's fourth meaning of status. (3) In modern law status is usually imposed because of defect of judgment in members of the class. Maine, thinking of his doctrine of progress from status to contract put this as a characteristic. Also in modern law a basis may be protection against their own weakness of those unable to look after themselves. In antiquity, status was involved in kin-organized society. Such things as *patria potestas*, wives in *manus*, and tutelage of women in Roman law are survivals from a patri-

39. *Supra*, note 18.

40. Paton, *Text-Book of Jurisprudence* (2 ed. 1951) 320-322.

41. To the cases put by Holland, *Jurisprudence* (13 ed. 1924) 35, and examples given by Paton it may be instructive to add the case of the free negro in the southern states of the United States before the Civil War. "They were in a state of perpetual pupillage or wardship, could act only by or through a guardian, and were on the same footing with slaves as to intercourse with white citizens. They occupied a position very similar to that of the class of freedmen in Rome known as *dediticii*, whose condition was but slightly removed from that of the slave." Cobb, *Law of Negro Slavery* (1858) 313-315. See also Taney, C. J. in *Dred Scott v. Sandford*, 19 How. (U.S.) 393, 407, 15 L.Ed. 691 (1856).

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archal regime rather than examples of exploitation of the weak as the economic interpretation would have it. Medieval guardianship as an incident of tenure of land was abused in this way, as Magna Carta shows us.⁴² But it was called for by the demand that one able to do the services be seised of an estate from which military service was due no less than by the need of providing protection for those who cannot protect themselves which is recognized by law universally. Sometimes a status is conferred to protect in the exercise of powers or to enable exercise of functions which excite jealousy or interference so that those put in a category of status are protected not against themselves but against others. Diplomatic representatives are an example. (4) Where a status is imposed to protect persons against themselves it involves incapacities. But where it is imposed to assure efficient exercise of an office it involves privileges. Status does not of necessity mean imposition of incapacities or restricted powers. (5) All groups or classes do not involve status. Hauriou's institutional theory⁴³ and Ehrlich's idea of society as made up of associations and groups and relations⁴⁴ are useful here. One may be a member of any number of organized groups in which certain of his activities are organized but in which his personality is

42. Magna Carta (1215) chaps. 2-3. See 2 Blackstone, Commentaries (1766) 75-77.

43. *Ante*, § 27.

44. *Ante*, § 27.

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not merged or affected. Status is a condition which affects generally a person's rights, powers, liberties, and privileges. Savigny pointed this out a century ago in criticizing the term status when used in the first of the four meanings given by Salmond.⁴⁵

French jurists use the term *état*, which, as they point out is the Latin word, and the Roman juristic term *status*, in another way, taken from the Roman *status civitatis* and *status familiae*. They use it to mean the position of the individual as a member of a political group (the nation) and of a determined family. Capitant puts it thus: "The different conditions the union of which make up the *état* of a person, national or foreigner, spouse, father, mother, legitimate child, natural child or adoptive child, etc., are the source of rights and obligations for the individual as well in the political as in the private order. In the political order the Frenchman enjoys rights and is held to duties which the foreigner does not have. In private law national character has equally great importance. Consanguinity gives the right to succeed and creates the duty of support between the next blood relatives; the quality of spouse gives rise to rights and obligations for each; finally, father and mother acquire certain rights over their children and are bound with respect to them by corresponding duties." Again he says: "The *état* of a person is fixed by the fact of his birth. From that moment a man is attached to a determined nation and joined by bonds of filiation to his father and mother and to their ascendants and to other members of the family by bonds of blood relationship."⁴⁶ Furthermore, he tells us, one's *état* may be modified during his life. This may be by voluntary act, change of nationality, marriage,

45. 2 Savigny, *System des heutigen römischen Rechts* (1840) 446; Savigny, *Jural Relations* (transl. by Rattigan, 1884) 318-319.

46. Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 152-153.

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or by the voluntary act of others, as in case of recognition of a natural child or its legitimation by subsequent marriage. Or there may be modification by action of the law as in case of divorce.⁴⁷ This is what might be called relational status.⁴⁸

Planiol uses the term both for position before the law and for relational status.⁴⁹ Every status supposes a contrary status, which might belong to the same person. For example: "To the quality of being French is opposed the quality of being an alien, to the status of being married the status of being single."⁵⁰ But does such an analysis have any significance for the law? Relational status plays an important part in French law, where so much is made to depend on national character and family relation. It has little utility for Anglo-American law where we deal with such relations differently in our systematic exposition. This bears out Austin's position that after all what we are dealing with is at bottom a matter of classification.⁵¹ The same may be said of attempts to classify status as absolute or relative (Beale)⁵² or as personal or juridical,⁵³ or as abstract or concrete.⁵⁴

It should be added that German jurists, after Savigny, do not use the term status or an equivalent but treat only of ca-

47. Ibid. 154-155.

48. "The position or standpoint which the individual occupies in relation to other men." 2 Savigny, *System des heutigen römischen Rechts* (1840) 454.

49. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 419, 422, 423, 427, 428.

50. Ibid. no. 422.

51. 2 *Jurisprudence* (5 ed. 1885) 696.

52. 2 Beale, *Conflict of Laws* (1935) § 119.2.

53. See Capitant, *Introduction à l'étude de droit civil* (4 ed. 1923) 152.

54. Starke, A Note on Status (1938) 54 *Law Quart.Rev.* 400, 404. By a curious clerical error he uses *statut* instead of *état* for *status*. *Statut* means statute or decree.

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capacity and incapacities and take up relational status under the several relations.⁵⁵

2. *Capacity*.⁵⁶ Capacity for rights must be distinguished from capacity for legal transactions (i.e. for acts intended to produce legal consequences to which the law, giving effect to the intention, attaches the intended consequence), capacity for wrongs (i.e. for acts involving civil liability for infringement of rights in rem), and capacity for crimes (i.e. for breaches of absolute duties for which the law provides penal consequences).⁵⁷ Want or loss of legal personality, therefore, is quite another thing from lack or loss of capacity for legal transactions or for wrongs or for crimes or for all of them. A person

55. 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 54-56; Regelsberger, *Pandekten* (1893) §§ 56-57; 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9 ed. 1910) §§ 24-27. Von Tuhr, speaks of *rechtliche Stellung* of women, *Stand* of nobles, and *Rechtsstellung* through relationship as formerly important. 1 *Der allgemeine Teil des deutschen bürgerlichen Rechts* (1910) § 24-27.

56. Allen, *Legal Duties* (1931) 45-70; Ehrlich, *Die Rechtsfähigkeit* (1909); Maine, *Ancient Law* (Pollock's ed. 1906) 172-174 and Sir Frederick Pollock's note L. 183-185; Holland, *Jurisprudence* (13 ed. 1924) 351-357; Von Tuhr, *Der allgemeine Teil des deutschen bürgerlichen Rechts* (1910) 377-379; Gareis, *Science of Law* (transl. by Kocourek, 1911) 103; 1 Dernburg, *Pandekten* (8 ed. 1911) §§ 39-45; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 54-56, 71; 3 Savigny, *System des heutigen römischen Rechts* (1840) §§ 106-112; 2 Binding, *Die Normen und ihre Uebertretung* (2 ed. 1890) §§ 32-35; Capitant, *Introduction à l'étude de droit civil* (4 ed. 1923) 178-192.

57. German jurists distinguish *Rechtsfähigkeit*, capacity for rights, and *Handlungsfähigkeit*, capacity for acts, which may be either *Geschäftsfähigkeit*, capacity for legal transactions, otherwise *Verfügungsfähigkeit*, disposing capacity, or *Zurechnungsfähigkeit*, delictal capacity. 1 Windscheid, *Pandekten* (9 ed. 1906) § 71; 2 Binding, *Die Normen und ihre Uebertretung* (2 ed. 1890) 46; Regelsberger, *Pandekten* (1893) §§ 56-57; Von Tuhr, *Der allgemeine Teil des deutschen bürgerlichen Rechts* (1910) 378-379.

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may have legal rights (using rights in the broader sense) and yet be incapable of legal transactions, or incapable of incurring legal liability, or incapable of responsibility for what would otherwise be accounted crimes. One whose legal personality is unaffected may have lost (as in case of insanity) or may not have attained (as in case of children of tender years) legal capacity to act in some or in all cases. Hence the law distinguishes between persons of full capacity and persons of partial or limited capacity. Ancient law conceded full legal capacity to a narrowly restricted class of legal persons. Modern law, on the other hand, endeavors to make legal capacity coincident with the possession of will (required as an element of an act) and judgment (required as an element of a legal transaction). The only exception in modern law is that for historical reasons and because of survival of ideas of the unity of the household, married women have been until recently, and still are in some jurisdictions, under a partial legal incapacity for legal transactions. With this disappearing exception the legal incapacities recognized in the law today coincide substantially with natural incapacities.⁵⁸

Capacity for rights means having legal personality; being a legal unit, possessing rights (in the broader sense)

58. Although American state legislation sometimes provides for civil death (see *post*, § 127) and outlawry still exists theoretically in England (see Richards, *Is Outlawry Obsolete?* (1902) 18 *Law Quart.Rev.* 297) for practical purposes human beings with no capacity for rights no longer have a place in the law.

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and having ability to acquire and exercise rights. It does not mean the rights themselves but an ability to exercise them. If status is used for the condition to which capacities and incapacities are attached, capacity and incapacity are appropriate for the power or lack of power involved in the condition. In truth, the German jurists speak of capacity for rights because they have given up using the term status. In English, with the terms status, capacity, and disability we have no need of using the phrase "capacity for rights."⁵⁹

Capacity, like status, is governed by compulsory rules of law. One cannot divest himself of his capacity for acts by private agreement. For example, if one voluntarily puts himself under guardianship it is of no legal effect.⁶⁰

3. *Conditions of incapacity.*⁶¹ (a) *Slavery.*⁶² A preliminary category of human beings not recognized as persons, or if so recognized conceded only a minimum capacity for rights, must first be considered. There were three stages in the Roman law of slavery. In the first, the slave is a dependent member of the household like the

59. There is an excellent discussion in Allen, *Legal Duties* (1931) 46-47.

60. 1 Dernburg, *Pandekten* (8 ed. 1911) § 39.

61. Holland, *Jurisprudence* (13 ed. 1924) 351-359.

62. Buckland, *The Roman Law of Slavery* (1908); Maine, *Ancient Law* (Pollock's ed. 1906) 166-170; 2 Kent, *Commentaries on American Law* (1826) 248-258; Hurd, *The Law of Freedom and Bondage in the United States* (2 vols. 1858-1862); Cobb, *Law of Negro Slavery* (1858).

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son in *potestas* of his father⁶³ or the wife in the *manus* of her husband. Law existed for the heads of households, not for the dependent members of the household. Within the household the oldest law had nothing to do. In a second stage, with breakdown of the old household organization and the rise of industry, slaves ceased to be merely domestic. The services of slaves were let for hire. There could be a servitude of *operae seruorum*—a limited real right of one in the slaves of another to have their labor.⁶⁴ Slaves were used in numbers to cultivate large areas, not simply on the old Roman family homestead. Hence the idea arose that the slave was property; not held in *potestas* like a son, but in *dominium* like a horse. But the doctrine that slaves were a part of the household had come down from the prior stage. Traditionally, slaves were in *potestas*. So it could be said there were two kinds of *potestas*, that of a house father and that of a master.⁶⁵ Thus in the law of the classical period a slave has two aspects. *Ciuitiliter* he is property. He can be bought and sold, bequeathed by legacy and a usufruct in him can be created.⁶⁶ But he is a human being with reason and will and so he is

63. So St. Paul: "Now I say that the heir, as long as he is a child, differeth nothing from a servant, though he be lord of all." Galatians, 4, 1.

64. Dig. 35, 2, 1, 9; id. 2, 2; 1 Windscheid, Pandekten (9 ed. 1906) § 208.

65. The term *dominica potestas* is not in the Roman books. But they say that of persons subject to the authority of another some are in the *potestas* of parents and some in the *potestas* of masters (Inst. 1, 8, pr.); that slaves are in the *potestas* of their masters (Gaius, 1, 22); and also that they are reduced to ownership (Dig. 1, 5, 6, 1) and are *res Mancipi* (Ulpian, Rules, xix, 1).

66. Inst. 2, 4, 2.

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naturaliter a person and can have a legal power. He may act for his master and bind the latter by his action.⁶⁷ He may become subject to a natural obligation which will have legal consequences if he is afterward manumitted.⁶⁸ Finally, under the influence of natural law it came to be held that a slave, as a human being, was a person. But he was a person of a minimum capacity for rights and very great incapacities for acts.⁶⁹

As to negro slaves in America before the Thirteenth Amendment there was much dispute and some difference in state legislation. Using a phrase familiar to colonial America, the Constitution spoke of a "person held to service or labor."⁷⁰ On this basis it was argued that the slave was legally a person, not merely property.⁷¹ But there was little if any capacity of rights under the legislation of the states in which slavery existed. Most of what has been cited as showing recognition of the legal personality of the slave was legislation as to cruel treatment. This simply imposed absolute duties upon masters like the absolute duties imposed on owners of domestic animals by statute against cruelty to animals. So also as to statutes imposing penalties on one who injured another's slave. In neither case was there recognition of any interest of the slave himself or any legal right or legal power recognized in or conferred on

67. Gaius, 4, 73.

68. Dig. 2, 14, 7, 18; 2, 6, 64; 40, 5, 1, 4; 46, 1, 35.

69. The constitution of Antoninus Pius gave him a significant legal power. Gaius, 1, 53. As to other powers see Buckland, *Roman Law of Slavery* (1908) 166 ff.

70. Art. IV, sec. 2, clause 3.

71. *Federalist*, no. 54, (Lodge's ed. 1802) 340; McLean, J. in *Groves v. Slaughter*, 15 Pet. (U.S.) 449, 506-507, 10 L.Ed. 800 (1841).

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the slave. In truth, there was scarcely a shadow of capacity for rights and less capacity for acts than was had by the Roman slave. In Louisiana the civil code provided as to a slave that the master might "dispose of his person, his industry, his labor; he can do nothing, possess nothing, nor acquire anything but that must belong to his master."⁷² Slaves were forbidden to assemble for religious worship, at least after sunset.⁷³ They were forbidden to preach,⁷⁴ to "act as if free,"⁷⁵ to travel by themselves,⁷⁶ to trade,⁷⁷ to hire themselves out,⁷⁸ or to raise cotton for their own benefit.⁷⁹ It was a crime to teach them to read and write.⁸⁰ They could only testify against a free negro.⁸¹ The one case where some capacity for rights is clearly recognized is to be found in a provision of the Civil Code of Louisiana: "The slave who has acquired the right to be free at a future time may take property by gift."⁸²

(b) *Bondmen, serfs or villeins, and indentured servants.* Although medieval jurists sought to identify

72. Louisiana Civil Code, 1925, art. 35.

73. Virginia, Laws of 1903, chap. 97; South Carolina, Laws of 1800, 440; Tennessee, Laws of 1831, chap. 103; Georgia, 1793, Cobb's Digest of the Statute Laws of Georgia (1851) 982.

74. Laws of Louisiana, 1832, chap. 22.

75. Laws of Tennessee, 1839, chap. 47.

76. Laws of Kentucky, 1838, 155. See *Johnson v. Bryan*, 1 B.Mon. (Ky.) 292 (1841).

77. Alabama, Act of Jan. 2, 1826; id. Acts of 1844-1845, no. 222; Georgia, Act of 1803, Penal Code of 1833, div. 3, § 13.

78. Maryland, Act of 1787, chap. 33.

79. Mississippi, Acts of 1818, 1st Session, p. 168.

80. Cobb's Digest of the Statute Laws of Georgia (1851) 829.

81. Maryland, Laws of 1801, chap. 109; id. Laws of 1808-1809, chap. 51. But not if white persons were concerned. Laws of 1846-1847, chap. 27; Alabama, Act of Jan. 9, 1835.

82. Louisiana Civil Code (1825) art. 193.

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the serf, or villein as the English called him, with the Roman slave, he had much greater capacity for rights and for acts and, as to third persons, was said to be free and capable of suing actions. The lord had power over his property. But against any one else he was well protected. It was laid down that whatever he got was acquired by the lord. He had no money nor chattels of his own. But he could have possession. What he acquired did not of itself pass into the possession of the lord. If the lord for any reason did not take it into his possession the villein in possession was in the position of an owner as to third persons. He could dispose of the property, had real actions to secure him against every one but the lord, and could transmit his claim against a disseisor to his heir. Indeed, he had the advantage of all actions against every one but his lord. So long as his lord did not interfere he could act in all respects like a free man.⁸³ As Coke put it villeins are "free against all men saving their lord."⁸⁴ They were indubitably legal persons.

Colonial America was familiar with the indentured servant bound to a master for labor and service for a term of years. The British government aided colonization by giving legal sanction to a system of indenture. "Thousands of indentured servants went to the American colonies."⁸⁵ Binding as servants to be sold to colonists was used as a means of transporting crimi-

83. Vinogradoff, *Villainage in England* (1892) 68-69.

84. Coke, *Second Institute* (1642) 45.

85. 1 Andrews, *The Colonial Period of American History* (1934) 63. The indentured servant at common law was indentured as an apprentice. 2 Kent, *Commentaries* (1826) 261-266.

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nals, so that Nathan Dane could write of "criminals and debtors in slavery."⁸⁶ In Connecticut, debtors were "assigned in service to pay debts."⁸⁷ In Massachusetts, criminals were "sold in service for costs," and debtors might be "assigned" in service to pay a debt or "delivered over in service" for satisfaction of a debt.⁸⁸ Those so bound or assigned had full capacity for rights. Their capacity for acts might be limited where they came besides in some other category which involved incapacity such as minority or conviction of felony. Their acquisitions were acquired to the master. This category has historical interest in America because it gave the term used in Articles I and IV of the federal Constitution.

(c) *Freedmen*. In Roman law, the freedman had a number of disabilities in public law, e.g. inability to be a magistrate.⁸⁹ There were a few in private law. Under the Republic he could not marry any free born person and later could not marry any one of the *ordo senatorius*, i.e. agnatic descendants so far as grandchildren of a senator.⁹⁰ Also until the second century he could not take state contracts.⁹¹ He owed duties of *obsequium* to his patron, i.e. the one who had freed him, i.e. gifts on special occasions and services not excessive and suited to his age, position, and training.⁹² But certain degraded

86. 2 Dane, General Abridgment and Digest of American Law (1823) 317.

87. Ibid.; Reeve, Law of Baron and Feme (1816) 339. Reeve classifies servants as: (1) Slaves, (2) apprentices, (3) menial servants, (4) day laborers, (5) agents of any kind, and (6) "debtors assigned to service to pay a debt."

88. 2 Dane, Abridgment, 317.

89. 3 Mommsen, Römische Staatsrecht (1887) 440.

90. Dig. 28, 2, 44, pr.

91. 3 Mommsen, Römische Staatsrecht (1887) 518.

92. Dig. 37, 1, 7, 4; id. 1, 2, 16; id. 1, 50; Cod. 6, 3, 3, 5.

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slaves on manumission were put by statute in the category of *dediticii*. It included those who had been punished by branding or chains or imprisonment by their master or had been condemned to fight with beasts, or tortured and convicted of crime.⁹³ They could not live within one hundred miles of Rome, but had the ordinary powers recognized by the *ius gentium* except that they could not make wills, not being members of any community.⁹⁴ The position of the free negroes in southern United States before the Civil War was even worse than that of the *dediticii*, to whom the writers on slavery compared them.⁹⁵ They were "in a state of perpetual tutelage or wardship." They could only act through or by a guardian. The penal slave code extended to them, and their "condition was but slightly removed from that of a slave."⁹⁶

(d) *Aliens*.⁹⁷ In a kin-organized society the alien has no place in the personal law of the kin group.⁹⁸ The

93. Gaius, 1, 12.

94. Gaius, 3, 75; Ulpian, Rules, xx, 14.

95. Cobb, Law of Negro Slavery (1858) 315.

96. Ibid. 314, 315; Taney, C. J. in *Dred Scott v. Sandford*, 19 How. (U.S.) 393, 15 L.Ed. 691, 402-405, 407-409 (1856); Lumpkin, J. in *Bryan v. Walton*, 14 Ga. 185, 197-203 (1858). Legislation as to them may be found in 2 Hurd, Law of Freedom and Bondage (1862) chaps. 17, 18, 19.

97. 1 Bar, *Theorie und Praxis des internationalen Privatrechts* (2 ed. 1889) §§ 95-103. For the psychological and economic background see Michels, *Materiellen zu einer Soziologie des Fremden* (1925) 1 *Jahrbuch für Soziologie*, 296-317; Brinkmann, *Wirtschafts- und Sozialgeschichte* (1927) 72-73.

98. Fustel de Coulanges, *The Ancient City* (transl. by Small, 1874) 257-264. "For one whom we now call foreigner (*peregrinus*) our ancestors used to call enemy (*hostis*), and the XII Tables show this." Cicero, *De Officiis*, I, 12, 37.

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kin group is the legal unit. With the rise of political organization of society and in the stage of the strict law, the citizen becomes the legal unit.⁹⁹ Thus in the formative period of law the alien has either no capacity or a very limited capacity for rights. The development of trade and commerce leads to giving him capacity for legal transactions, and ideas of natural law lead to giving him full capacity for rights. In the maturity of law except for the enemy alien in time of war limitations of legal capacity of aliens in private law substantially disappeared. As Windscheid puts it: "The limitation of the capacity of foreigners for rights, which is found in the earlier Roman law, had already lost all practical meaning in Justinian's law. . . . The Roman *peregrini*, who had capacity for rights only according to the *ius gentium*, not according to the *ius civile*, belonged to a foreign people but not of necessity a foreign state. In the law of Justinian it appears the established rule that those who belonged to the Roman state belonged also to the Roman people, and the Roman state was co-extensive with the civilized world. . . . The modern common law [i.e. the civil law of Continental Europe based on the Roman law] for the purposes of private law knows of a less favorable treatment of foreigners only in very isolated applications."¹⁰⁰

99. *Ante*, §§ 32, 33.

100. 1 Windscheid, *Pandekten* (9 ed. 1906) § 55 and note 5.

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Roman law on this point went through three stages.¹⁰¹ Originally one was either a *civis* and so had standing before the law—had legal rights in the wider sense, especially legal powers, and was subject to legal duties—or he was a *peregrinus*, in which case the strict law wholly ignored him. He had no standing before the *ius civile*. But *peregrini* by the *ius gentium* had capacity for rights and capacity for legal transactions,¹⁰² and this made available to them almost the whole law of contracts. In a second stage there is a further differentiation. There are (1) the *civis* who has full standing before the strict law; (2) freedmen who have a special position with respect to citizenship—(i) the *Latinus Iunianus* (Latin by the Junian Law), (ii) the *dediticius* (literally, alien enemy who had passed under the yoke); (3) the *peregrinus* as before.¹⁰³ A freedman regularly manumitted became a citizen. The category of irregularly manumitted freedmen had some rights by the strict law. In the old days of the Roman city, Latins had been admitted to partial citizenship by treaty. Afterward the Latins were given a full citizenship. But the term Latins was applied to the members of the earliest colonies and later, when peoples or cities were incorporated into the Roman state with partial citizenship, their inhabitants were called *Latini colonarii*. The *Latini Iuniani* were irregularly manumitted slaves who were equitably but not legally free and by the strict law were not citizens. The *Lex Iunia*, of uncertain date but of near the beginning of the first century A. D., gave them the legal position of Latins. They had a partial citizenship with restricted political rights. The *dediticii* were an inferior type of slave who, when manumitted, were free but had no citizenship and could not become citizens. In the third stage legislation of Caracalla (212 A. D.) made every

101. Mitteis, *Römisches Privatrecht* (1908) § 7; Buckland, *Text-Book of Roman Law* (2 ed. 1932) 86–100.

102. Dig. 48, 19, 17, 1.

103. Gaius, 1, 14, 22–25, 95–96; Ulpian, *Rules*, 1, 5, 6, 10, 11.

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freeman in the empire except a *dediticius* a citizen. Every respectable freeman in the civilized world was a citizen. There might still be Junian Latins and *dediticii* as the result of manumissions. Justinian abolished the category of *dediticii* and made citizens of the Latins. That left only barbarians and *deportati* without citizenship.¹⁰⁴

Modern law on the Continent started from Justinian's codification. But Germanic law had brought in ideas and institutions of kin-organized society in the earlier Middle Ages which had to be gradually outgrown. In the old French law aliens had no capacity of acquiring or of transmitting either by intestate or by testamentary succession. They could not act as witnesses in formal transactions. On the death of an alien all the goods he possessed in France were confiscated to the profit of the King and if a Frenchman died leaving an alien as heir or legatee the latter could not get in the goods of the deceased. In many ways the situation of the alien was inferior to that of the citizen. The French Revolution abolished all these incapacities. Today if an alien has obtained from the government authority to fix his domicile in France he has all the civil rights of a Frenchman. If he is not admitted to a French domicile he has in France the same civil rights as are accorded to the French by treaty with the nation to which he belongs.¹⁰⁵ If the country to which he belongs has no treaty with France it is held by

104. Cod. 7, 5, 1.

105. French Civil Code, art. 13.

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the text writers that the alien for the most part at least enjoys civil rights.¹⁰⁶

In Germany the introductory statute of the Civil Code left it to the several states to determine by legislation whether and how far an alien could acquire immovable property.¹⁰⁷ No other restriction upon the capacity for rights in case of natural persons remained.¹⁰⁸

At common law an alien cannot acquire title to real property by descent nor take by curtesy or in dower nor can a citizen take real property by representation from an alien. An alien, however, may take land by conveyance or devise (gift by will) and hold until by a proceeding for that purpose called "inquest of office found" there is an escheat. His title is good as against every one but the King (or state in the United States) as long as he lives. But on his death the estate at once rests in the King (state) without any proceeding for that purpose. If he conveys the land the purchaser gets good title against every one but the King (state) subject to proceedings for escheat. On the other hand, aliens can acquire, hold, and transmit personal property the same as citizens, and can take a mortgage upon land as security for a debt and, if necessary, foreclose the mortgage by proceedings in court.

106. Capitant, *Introduction à l'étude de droit civil* (4 ed. 1923) 156-160.

107. *Einführungsgesetz zum bürgerlichen Gesetzbuch* (1897) § 88. Schuster, *Principles of German Civil Law* (1907) 19.

108. Von Tuhr, *Der allgemeine Teil des deutschen bürgerlichen Rechts* (1910) 434-435.

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They can sue and be sued as any other person may, even in the case of resident alien enemies in time of war, so long as they are allowed to remain in the country.¹⁰⁹

In England, these common-law disabilities of aliens were done away with by statute in 1870.¹¹⁰ In the United States, treaties, which under the federal constitution are binding upon the states notwithstanding state legislation or common law,¹¹¹ often provide that aliens, citizens of some other countries may hold land or acquire it or transmit it by inheritance.

Thus except for enemy aliens in time of war disabilities of aliens have substantially disappeared in all countries as they had disappeared in the maturity of Roman law.

In the case of enemy aliens in time of war disabilities are not merely historical. They are retained or imposed in order to maintain the social interest in the general security. Originally it was the rule that the alien enemy had no legal standing. The outbreak of war of itself deprived him of access to the courts. But this rule vanished in many continental countries, surviving in Great Britain, the United States and France. In Great Britain, however, the disability to sue obtained in prac-

109. 1 Blackstone, *Commentaries on the Laws of England* (1765) 366-375; 2 Kent, *Commentaries on American Law* (1826) 33-75.

110. 33 Vict.Ch. 14 (1870).

111. Const.U.S. art. VI.

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tice only as to non-resident enemy aliens and not in all cases as to them. The exigencies of war demand restriction if not prohibition of all intercourse and especially trading with the enemy, and this may involve considerable restriction of capacity for legal transactions.¹¹²

As to conditions of incapacity in persons not in the foregoing categories, it may be convenient to classify those which obtain in modern law and those which have obtained in legal systems in the past, under five heads, according to the social interests on which they are based or to which they respond.

(e) *Conditions of capacity and incapacity responding to the social interests in the security of domestic institutions and in the individual life by protecting those unable to care adequately for themselves.* Much in this category took form in kin-organized society and has had to be made over in modern law to fit the situation in the world of today in which those interests are to be secured.

In Roman law persons were said to be either *sui iuris* or subject to the authority of another who had a duty of protecting and powers of control or of validating acts of those under his authority.¹¹³

(i) *Sex.* In a social order in which physical self help even if regulated was a major form of social

112. There is a full discussion in 2 Oppenheim, *International Law* (6 ed. revised by Lauterpacht, 1944) 249-267.

113. Inst. 1, 8, pr.

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control, protection of women demanded guardianship or incapacities of disposition.

In Hindu law the theory of an undivided family takes care of maintenance, and limitations of legal capacity protect against imposition and improvidence.¹¹⁴ By the Roman strict law unmarried women, unless in the *potestas* of *paterfamilias*, were in the perpetual tutelage of the agnates, but a testamentary *tutor* (guardian) might be provided instead.¹¹⁵ In the classical period this tutelage became a mere form as to adult women. The *tutor* did not administer the affairs of the adult woman. All he did was to give formal legal efficacy to her acts. Moreover, she could do without his authority things which did not require a formal act or a transaction of the strict law. The woman could obtain a different *tutor* on application to the praetor, or a special *tutor* could be appointed to interpose his authority for a particular transaction, or even in a clear case the *tutor* would be compelled by the praetor to ratify. Thus, for substantial purposes a woman of twenty-five not in *manus* of a husband or *potestas* of her father, had full power of dealing with her property as her own.¹¹⁶ In the first century A. D., Claudius abolished the statutory¹¹⁷ tutelage of the agnates.¹¹⁸ The whole matter of tutelage of women (unless under age) came to an end not long after Diocletian.¹¹⁹ In Germanic law women were in lifelong guardianship. The nearest agnate was guardian of the unmar-

114. Mayne, *Hindu Law and Usage* (10 ed. 1938) chap. 17.

115. Gaius, 1, 144. As to perpetual tutelage of women in Greece see Hermann, *Lehrbuch der griechischen Rechtsaltertümer* (4 ed. 1895) 8-12.

116. *Ibid.* 145.

117. I. e. under the XII Tables.

118. Ulpian, *Rules*, xi, 9.

119. The ultimate limit is a law of 410 A.D., which gave all women the *ius liberorum* that had the effect of doing away with subjection to tutelage. *Cod.Theod.* 8, 17, 3.

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ried woman, the husband guardian of the wife, and the nearest agnate of the deceased husband guardian of the widow. But if the husband was not equal in rank, then the nearest agnate of her own kindred.¹²⁰ But nothing is known in Anglo-Saxon law that can be called perpetual tutelage of women, and after the Norman conquest the woman of full age who had no husband was in England a fully competent person for all purposes of private law.¹²¹ In the common-law system the *feme sole* of full age has full legal capacity.

(ii) *Subjection to marital authority*—*manus, mund, coverture*.¹²² In Roman law *manus* was the control of the husband as *paterfamilias* over his wife as a dependent member of his household. The wife in the *manus* of her husband was in the position of a daughter. She succeeded to the inheritance the same as a daughter and what she acquired while in *manus* was acquired by the husband.¹²³ But the right and power of the husband seem not to have gone so far as those of a father. Apparently she could not be surrendered to an injured person for an injury done by her nor given in adoption nor sold by a formal transfer. At least there is nothing to show that such powers were exercised.

120. Brunner, *Grundzüge der deutschen Rechtsgeschichte* (4 ed. 1910) 224.

121. 2 Pollock and Maitland, *History of English Law* (2 ed. 1898) 437.

122. Gaius, 1, 108–115; Buckland, *Text-Book of Roman Law* (2 ed. 1932) 118–121; Karlowa, *Römische Rechtsgeschichte* (1901) §§ 11–17. As to married women in Hindu law see *supra* note 114. The husband of full age was the guardian of his wife. Mayne, *Hindu Law and Usage* (10 ed. 1938) 301. As to Greek law see *supra* note 115.

123. Gaius, 2, 96, 139.

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Manus was gained by any of the three forms of marriage recognized by the strict law. One, *confarreatio* was a religious ceremony with formal words in the presence of ten witnesses accompanied by a sacrifice to Jupiter and eating of a flour cake.¹²⁴ It was appropriate to patricians and was required of those holding certain religious offices. By the end of the republic with the decay of the old household and religious organization people were averse to *manus*. Legislation of the reign of Tiberius limited it in certain cases to the purposes of the *sacra* and it may be that all cases of *confarreate* marriage were included.¹²⁵ The last reference to this form of marriage is in Ulpian's Rules.¹²⁶ A second form, *coemptio* was a sale of the wife to the husband by the formal mode of transfer creating a legal title (*per aes et libram*), but with different words from those used where a son or a slave was sold.¹²⁷ It may be that originally there was a sale by the father. But as we know it from the Roman law books the bride sold herself with the interposed authority of her father or guardian.¹²⁸ *Coemptio* came to be used also as a device for enabling a woman to make a will (down to the time when Hadrian allowed women to make wills without the authority of their tutor) or to change tutors.¹²⁹ So far as *manus* still existed as a substantial condition of subjection to authority by the middle of the second century A. D. it was brought about by *coemptio*. The third form was *usus*. Gaius tells us that a woman came into *manus* by *usus* if she lived with her husband for a year without

124. Id. 1, 112.

125. Gaius, 1, 136. The text is illegible and has been filled out by conjecture.

126. Rules, tit. ix.

127. Gaius, 1, 123.

128. Mosaicarum et Romanarum Collatio, iv, 7, 1, Girard, Textes de droit romain (6 ed. 1937) 582.

129. Gaius, 1, 114-115b.

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interruption "being as it were acquired by usucapion through possession for a year and so passing into the family of her husband and gaining the position of a daughter."¹³⁰ This mode of creating *manus* disappeared early. The Twelve Tables provided that where a woman did not wish to be in the *manus* of her husband she could absent herself for a period of three nights each year and so break the continuity of possession. We are told that coming into *manus* by *usus* existed in the generation before Cicero.¹³¹ In the time of Gaius it had disappeared partly by legislation and partly by desuetude.¹³²

In the maturity of Roman law women of full age, married or unmarried, had ceased to be subject to another's authority. They were fully emancipated.

Germanic law brought back into the law of Continental Europe older ideas which entered into modern law but have been disappearing under recent legislation. In the Germanic law the wife was in the *mund* or guardianship of the husband.¹³³ This institution was fortified by teachings of the church as to the unity of husband and wife. It has survived in the regime of "community property" or the matrimonial property regime which obtains generally in Continental Europe. This was essentially a system of management of common property resting upon the power of guardianship in the husband. It has been said that those who drew up the French Civil

^{130.} Ibid. 111.

^{131.} Aulus Gellius, iii, 2, 13.

^{132.} Gaius, 1, 111.

^{133.} Brunner, Grundzüge der deutschen Rechtsgeschichte (8 ed. 1930) § 53.

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Code had no clear idea of a definite system. They codified the rules which had grown up historically without principle or unifying reasons. Partly there was an idea of protecting the wife and partly one of subjecting her to the authority of the husband.¹³⁴ The resulting incapacities of married women in French law have been progressively modified and subjected to exceptions. It is recognized that they have no longer any good reason for existence.¹³⁵

The general principle under the French Civil Code is that a married woman cannot enter into any legal transaction or carry on legal proceedings as plaintiff or as defendant without the consent of her husband.¹³⁶ But if the husband refuses consent or cannot be reached or is incapable she may apply to a court for the required consent.¹³⁷ If she has been judicially separated she has full legal capacity.¹³⁸ Also if by contract at the time of marriage she has separate property she may manage it. Likewise she may be given authority to engage in business for herself and can then engage in all legal transactions incident to the business.¹³⁹ She may make a will without her husband's authority.¹⁴⁰ By statute she has been given management of the

134. 1 Beudant, *Cours de droit civil français*, no. 343 (1896). There seems to have been confusion of the Germanic proprietary guardianship and a misunderstanding of a Roman doctrine. See 1 Colin et Capitant, *Cours de droit civil français* (7 ed. 1932) 617.

135. Capitant, *Introduction à l'étude de droit civil* (4 ed. 1923) 187.

136. French Civil Code, art. 215.

137. *Ibid.* arts. 219, 221, 222, 224.

138. *Ibid.* art. 311.

139. French Commercial Code, arts. 5, 7.

140. French Civil Code, art. 226. Now superseded by Act of 22 September, 1942, extending the wife's capacity.

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proceeds of her own work.¹⁴¹ She has a general power to contract for necessary expenses of the household and make the husband liable therefor. But it is considered that she does so as agent of the husband and he may revoke the authority.¹⁴²

Under the German Civil Code restrictions on the capacity of married women to bind themselves by contract, which existed in many of the German states before 1900 were wholly removed. A wife has full capacity for legal transactions.¹⁴³ But as a rule obligations entered into without the husband's concurrence cannot be enforced against property which is to be managed by the husband under the matrimonial property regime by which they are governed. The husband has the power of choosing the place of abode, subject to the limitation that his decision must not be an arbitrary abuse of the power.¹⁴⁴ The wife, however, has the power of managing the affairs of the joint household and a power of binding the husband's credit within the scope of that power. The power may be restricted by the husband, but if it is restricted arbitrarily the restriction may be set aside by a court.¹⁴⁵ She is bound to personal services in household affairs and the husband's business so far as customary in their walk of

141. Law of 1907, 13, 7; Law of 22 September, 1942.

142. 3 Planiol, *Traité élémentaire de droit civil* (11 ed. 1932) no. 1100. On the whole subject see Josserand, *Cours de droit civil positif français* (2 ed. 1932) nos. 599-645.

143. German Civil Code, § 1125.

144. *Ibid.* § 1354.

145. *Ibid.* § 1357.

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life.¹⁴⁶ A court may authorize the husband to revoke an agreement of the wife for personal service if it is found to be injurious to the interests of the joint life.¹⁴⁷ Property owned by either at the time of marriage or acquired afterwards is governed by the matrimonial property regime which may be statutory or contractual, i.e. fixed by statute or determined by contract either at the time of marriage or subsequently.¹⁴⁸

Certain property is privileged, i.e. the wife has complete power of disposing of it. This includes things intended for the wife's personal use, things acquired by the wife's labor or by trade carried on by her independently of the husband, property made privileged by the marriage contract or given her as privileged by will or gift, and property acquired in substitution for privileged property.¹⁴⁹ The husband may take possession of and manage non-privileged property and has the usufruct thereof. But he must bear the expenses of the joint household and the income, if the wife so request, must first be applied to maintaining her and the children of the marriage.¹⁵⁰ The statutory regime, which obtains in the absence of contract, puts the whole or certain parts of the property of husband and wife in co-ownership in equal parts, but makes the husband manager of the common property and gives him the right to receive the income as manager of the community. But certain transactions require assent by the wife: Disposition of the whole or an aliquot

146. Ibid. § 1356.

147. Ibid. § 1358.

148. Ibid. §§ 1365-1372, 1432-1434, 1364.

149. Ibid. §§ 1365-1370.

150. Ibid. §§ 1363, 1383-1389. The wife is well secured against mismanagement by the husband. Ibid. §§ 1391-1394.

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part of the common property; dispositions of immovables; promises of gifts or gifts not made to satisfy a moral duty. A disposition in satisfaction of an agreement made with the wife's consent can be made by the husband alone.¹⁵¹

Provisions of the Swiss Civil Code of 1907 are much the same.¹⁵² Legal transactions between husband and wife, which were not allowed until the present century, are now generally permitted by the codes.¹⁵³ Recent legislation in countries and in states of the United States in which the community property regime obtains restricts or regulates the husband's power of management of the common property.¹⁵⁴

At common law it is said that husband and wife are legally one person.¹⁵⁵ The wife is called a *feme covert*, a woman whose legal personality is merged in that of husband and wife, while an unmarried woman is spoken of as a *feme sole*. The doctrine of the legal unity of husband and wife is a lawyer's way of generalizing a number of rules coming down from an older stage of social devel-

151. Ibid. §§ 1443-1447.

152. Swiss Civil Code, arts. 162-177.

153. Ibid. art. 177.

154. German Civil Code, §§ 1440-1455; Swiss Civil Code, arts. 215-224; Wright, Community Property in Europe and America (1925) 11 Am.Bar Ass'n Journ. 703; Kirkwood, Historical Background and Objectives of the Law of Community Property in the Pacific Coast States (1936) Washington Law Rev. 1; Daggett, Is Joint Control of Community Property Possible? (1936) 10 Tulane Law Rev. 589.

155. 1 Blackstone, Commentaries (1765) 441.

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opment in which the wife was one among the dependent members of a patriarchal household. Progress of civilization, the example of the matured Roman law in which the wife had been wholly freed from the conditions of incapacity and subjection to authority in which she stood in the older law, and the teachings of the church, which looked upon the wife as a moral unit, to be treated therefore as a legal unit,¹⁵⁶ led to a progressive breaking down of the old marital authority, which none the less survived in the incapacities of coverture till the nineteenth century.

As incidents of the unity of legal personality at common law, a husband could not convey property to or contract with his wife. It was necessary for him to convey to a third person who then conveyed to the wife.¹⁵⁷ Nor could she devise land to her husband, because, it was said, she was supposed to be under his coercion and a will must be made freely.¹⁵⁸ But he could bequeath to her by will because the gift did not operate till she had acquired a separate personality by his death. Also he could make her his agent because she could represent the common personality.¹⁵⁹ The idea of community of property, however,

156. Hence in the eyes of the church husband and wife were separate persons and in the ecclesiastical courts a married woman could sue and be sued without her husband. *Bennett's Case*, 2 Rolle Abr. 298 (1618).

157. *Firebrass v. Pennant*, 2 Wils. 254 (1764). As to contract see *Bassett v. Bassett*, 112 Mass. 99 (1873).

158. *Marston v. Norton*, 5 N.H. 205 (1830).

159. *Hopkins v. Mollinieux*, 4 Wend. (N.Y.) 465 (1830).

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did not come into the common law.¹⁶⁰ On marriage, property in the wife's chattels passed to the husband. He was said to have title by marriage. Also he was seised of her life estates in land (although in her right) and was entitled to the profits, and acquired a usufructuary interest in her estate of inheritance entitling him to the use and to the rents and profits.¹⁶¹

Again, she could not sue for an injury to her person or property except with her husband's concurrence and in the name of husband and wife. Nor could she be sued except by joining the husband as a defendant. Neither could be a witness for or against the other except where the husband was prosecuted for an offense against the person of the wife.¹⁶²

A married woman could not convey her property during coverture except by "fine", a fictitious action of covenant and compromise of the action in which she was separately and secretly examined to insure that she was acting of her own free will. In colonial America, however, where fines were not used, legislation allowed conveyance with the consent of the husband.¹⁶³ Except for this, she had no capacity for legal transaction.¹⁶⁴ More-

160. 2 Pollock and Maitland, *History of English Law* (2 ed. 1898) 402.

161. 2 Kent, *Commentaries on American Law* (1827) 130-143.

162. *Ibid.* 154-161, where a few exceptions are discussed.

163. *Ibid.* 151-154. So by legislation in England in 1833. 3 & 4 William IV, ch. 74, §§ 77-91.

164. *Prat v. Taylor*, Cro.Eliz. 61 (1588); *Loyd v. Lee*, 1 Strange, 194 (1719); *Concord Bank v. Bellis*, 10 Cush. 276 (1852).

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over, except in case of murder and treason, she was supposed, where she committed a crime in the presence of her husband, to act under his coercion, and if the husband was not present she might show coercion as a fact.¹⁶⁵ But coercion is not a defence in Anglo-American criminal law except for a wife.¹⁶⁶ The scriptural injunction "wives submit yourselves to your own husbands as to the Lord"¹⁶⁷ put a severe moral pressure on the wife in the Middle Ages and indeed until the last generation today, which it was the policy of the law to recognize.

As in the case of dependent members of the household, the husband had a privilege of restraint and "moderate correction." But in the seventeenth century the privilege of "correction" (i. e. chastisement) became obsolete, and a wife threatened with violence could have her husband bound over to keep the peace. It was not till the nineteenth century, however, that it was settled there was no legal privilege of restraining an erring wife of her liberty by locking her in the house.¹⁶⁸ The husband was not liable for debts contracted by the wife after marriage. But on marriage he became liable for her ante-nuptial debts.¹⁶⁹

In order to get control of the wife's chattel property, especially, in order to get possession of her credits and debts due

165. Anon., Kelyng, 31 (1664); Reg. v. Dykes, 15 Cox C.C. 771 (1885); Com. v. Daley, 148 Mass. 11, 18 N.E. 579 (1888).

166. McGrowther's Case, Foster C.L. 13 (1746).

167. Eph. 5:22.

168. Reg. v. Jackson, [1891] 1 Q.B. 671. In *Bradley v. State*, 1 Miss. 156 (1824) the court said by way of dictum that the husband might "be permitted to exercise the right of moderate chastisement in cases of real emergency and use salutary restraints in every case of misbehavior." The contrary was settled in *Gross v. State*, 135 Miss. 624 (1924).

169. 2 Kent, Commentaries on American Law (1827) 143-146.

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her, it was often necessary for the husband to go to a court of equity. Here he encountered the maxim that he who seeks equity must do equity and was required by the court to settle her property in trust for her as her separate estate.¹⁷⁰ Also it was usual if she had any considerable property to settle it before marriage upon trust for her benefit. Thus she got through courts of equity as to her settled property all the rights of a man or an unmarried woman and as to that property a fuller protection than was afforded to the unmarried woman by law. The court of equity compelled the trustee, as to dealings with the property, to do whatever she required of him. Thus she had complete contractual capacity in equity as to her separate estate, but in other matters was not bound legally by her agreements.¹⁷¹

All this was changed by legislation in the nineteenth century. Dicey has pointed out that the English legislation, instead of taking the simple form of enacting that married women with respect to their property and rights and liabilities connected with property should be on the same footing with unmarried women, followed the development in equity and made the wife's property her separate estate, as had been done by the courts of equity.¹⁷² The result was complicated and artificial statutes raising many difficult questions and not admitting of any systematic exposition. English legislation began in 1870¹⁷³ and was substantially complete in 1882.¹⁷⁴ American

170. 1 Story, *Equity Jurisprudence* (13 ed. 1886) 65-66.

171. 2 *Ibid.* chap. 37; Dicey, *Lectures on the Relation between Law and Public Opinion in England* (2 ed. 1914) 371-395.

172. Dicey, *op. cit.* 387-395.

173. *Married Women's Property Act*, 1870, 33 & 34 Vict. chap. 93.

174. *Married Women's Property Act*, 1882, 45 & 46 Vict. chap. 75.

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legislation has been very diverse. It began in 1839¹⁷⁵ and was substantially complete before 1886.¹⁷⁶ Although Roman law had gone the whole way in removing disabilities of and emancipating married women and the canon law had recognized their individual personality, legislation in the common-law world by the last quarter of the nineteenth century had gone further than Continental law has done in the present century.

At first, the American statutes were strictly construed as being in derogation of the common law, but they were gradually extended in their application by analogy and the net effect is that married women now have generally the same legal capacities as other persons except that here and there they have the protection of rules which arose in connection with their disabilities and survive after the disabilities have been removed.¹⁷⁷

(iii) *Subjection because of household organization: paternal authority (potestas)*. A distinction must be made between *potestas* (paternal power over even adults) involved in or growing out of household organiza-

175. Laws of Mississippi, 1839, chap. 46 (Feb. 15, 1839).

176. 2 Stimson, *American Statute Law* (1886) 717-728. Virginia was the last state to enact such legislation. Acts of 1877-1878, chap. 265, approved March 14, 1878.

177. See for example the rules as to power to charge the wife's property by contract. Tiffany, *Law of Persons and Domestic Relations* (2 ed. 1909) §§ 81-83.

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tion,¹⁷⁸ and guardianship imposed in developed legal systems because of defect of will or of judgment.

In Hindu law the guardianship of children is said to be in the King as *parens patriae*¹⁷⁹ but delegated to the child's relations. It has been much modified by ideas of English equity¹⁸⁰ and by legislation.¹⁸¹ The father can by will appoint a guardian of the person of his child, to the exclusion of the mother, and a court cannot appoint any one guardian of the person of a minor whose father is living.¹⁸² Thus little is left of the older paternal authority. In Greek law we are told that the founders of the Greek city-states ordained that children should be ruled by their fathers, some until two years beyond the time of reaching manhood and others until their names were inscribed in the registers of public buildings. It is said that the authority of the father was "curtailed by Solon, Pittakos of Lesbos, and Charondas."¹⁸³

There has been controversy whether the power of the father in the older Roman law represents an original incident of the Indo European household organization persisting at Rome, or represents "exaggerated consequences of principles admitting of a more liberal application."¹⁸⁴ At any rate, the authority of the head of the Roman household over sons and grandsons was

178. 1 Vinogradoff, *Historical Jurisprudence* (1920) 232-236; Mayne, *Hindu Law and Usage* (10 ed. 1938) 297-316; Cuq, *Manuel des institutions juridiques des romains* (2 ed. 1928) 134-154.

179. Manu (Transl. by Bühler, 1886) viii, 22.

180. Mayne, *Hindu Law and Usage* (10 ed. 1938) 304-305.

181. Indian Guardians and Wards Act (VIII of 1890).

182. Mayne, *Hindu Law and Usage* (10 ed. 1938) 300.

183. Dionysius of Halicarnassus (transl. by Vinogradoff, 1920) 1 *Historical Jurisprudence*, 232-233.

184. 1 Vinogradoff op. cit. 232.

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regarded by classical Roman jurists as all but unique.¹⁸⁵ As we know the institution from the Roman law books the paternal power was complete and unrestricted.¹⁸⁶ In the *ius publicum* the son under power (*filius familias*) might be consul or praetor or dictator. As such he might exercise *imperium* (magisterial authority to command) over his father as a citizen. But in private law the son in *potestas*, no matter what his age, no matter what public office he held or had held, was a dependent member of the household, subject to the authority of its head.¹⁸⁷ *Patria potestas* involved: (1) The power of life and death and hence of "correction" short of death.¹⁸⁸ In the classical law it was a crime to kill in the exercise of *patria potestas* without a formal judgment of *paterfamilias* as judge over his household with a council of agnates.¹⁸⁹ Ulpian in the third century laid down that in any case the son should be handed over to the courts for judgment.¹⁹⁰ (2) The power of sale. This might be a sale into slavery (*trans Tiberim*) or a power to sell into civil bondage. It was obsolete in the classical law.¹⁹¹ (3) The power of noxal surrender, a power of surrender in lieu of liability for the child's wrong. As to females this was obsolete in the Republic. Justinian abolished its last remnants.¹⁹² (4) The power of vetoing

185. "Likewise our children whom we have begotten in lawful marriage are in our *potestas*, which authority is peculiar to Roman citizens; for there are almost no other men who have *potestas* over their children such as we have . . . Nor does it escape me that the race of the Galatians believe children are in the *potestas* of their parents." Gaius, 1, 55.

186. Buckland, Text-Book of Roman Law (2 ed. 1932) 142-165; 1 Mitteis, Römisches Privatrecht (1908) § 5; 2 Karlowa, Römische Rechtsgeschichte (1901) 269-292.

187. Inst. 1, 12, 4.

188. Collatio legum romanarum et mosaicarum, iv, 8; Cod. 8, 48(47), 10.

189. 1 Cuj. Institutions juridiques des romains (1891) 156-157.

190. Dig. 48, 8, 2.

191. Paul, Sententiae, v, 1, 1.

192. Gaius, 4, 75-79; Inst. 4, 8.

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marriage and of terminating marriage of his child. As to power of divorce this seems to have been restricted under the Antonines but still subsisted for strong grounds under Justinian.¹⁹³ (5) The power to appoint a guardian by will.¹⁹⁴ (6) The power of appointing an heir for the child if the child survived *paterfamilias* but died before of age to make a will for himself.¹⁹⁵

Paterfamilias was entitled to all the acquisitions of the child.¹⁹⁶ But this right began to be cut down under Augustus and finally Justinian exempted from paternal control property acquired otherwise than through use of the patrimony of the household.¹⁹⁷ It is significant of the origin and history of this that the property so held by the son was called *peculium*, a term used to denote property held by a slave with the master's consent which the slave was allowed to use.

Emancipation was had by using a provision of the XII Tables that if the father sold the son three times the son should be free from the father. The method of emancipation was: *Paterfamilias* sold the son to a third person who then manumitted him. Thus the son returned to the *potestas* of the father. This process was then twice repeated. On the third manumission the son did not return into *potestas*. He was now *sui iuris*.¹⁹⁸ Justinian provided for emancipation by a proceeding before a court.¹⁹⁹ *Patria potestas*, although greatly restricted, was still a subsisting legal institution in the maturity of Roman law and so was

193. Paul, *Sententiae*, v, 6, 15; *ibid.* ii, 19, 2; *Cod.* 5, 17, 5.

194. Ulpian, *Rules*, xi, 14, 15; Gaius, 1, 196; *Inst.* 1, 13, 4.

195. Gaius, 2, 129; *Inst.* 2, 16.

196. Gaius, 2, 86; 3, 163.

197. *Cod.* 6, 61, 6.

198. Gaius, 1, 132.

199. *Inst.* 1, 12, 6.

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handed down from the law books of Justinian to the law of Continental Europe.

French doctrinal writers define *puissance paternelle* as "the aggregate of the rights and powers over the person and the property of their minor children in order to permit them to fulfill their duties as parents."²⁰⁰ It has been pointed out that the expression *puissance paternelle* has never been well taken in French law and is so less than ever today. What belongs to the parents is less a power (*potestas*) than a guardianship (*tutela*), that is to say, a charge. Moreover this power does not belong solely to the father as did the Roman *patria potestas*. The mother has it equally and exercises it in default of the father.²⁰¹

In the south of France (the *Pays de droit écrit*) the *patria potestas* of the Roman law, at least in its general spirit, was preserved, although the course of judicial decision in the *parlements* relaxed it. It still subsisted on some substantial points. It never belonged to the mother. It went on indefinitely, whatever the age of the son. The son, in principle, could not acquire for himself. Except for the Roman categories of *peculium*²⁰² everything belonged to the father and he had the enjoyment of things, property in which was in the son. Also the son had no capacity of borrowing money to be repaid on death of the father or of testation.²⁰³ In the north of France (the *Pays de droit*

200. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) No. 1636; 1 Josseland, *Cours de droit civil positif français* (2 ed. 1932) no. 1076.

201. Planiol, *op. cit.*, no. 1630, *obs.*

202. See *ante*, § 85, notes 92-94.

203. *Ibid.* no. 1637.

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coutumier) there was a maxim that *puissance paternelle* did not obtain. The mother had guardian's authority as well as the father and the authority of each did not extend beyond majority of the child. In other words, the paternal power was not the Roman *patria potestas*.²⁰⁴ It was significant that there were many implied emancipations which grew up in judicial decisions in the south of France.²⁰⁵

Legislation during the Revolution abolished *puissance paternelle* as to children who had reached majority and in the framing of the Civil Code in 1804 the term *autorité paternelle* was used instead.²⁰⁶ But the Roman-law term persisted in the books.²⁰⁷ From 1851 on there was successive legislative provision for partial or total termination of paternal authority, culminating in an act of 1921.²⁰⁸ The Civil Code attributes paternal authority jointly to the father and the mother.²⁰⁹ But it goes on to say that the father alone shall exercise it during marriage.²¹⁰ Only in case of death, insanity or absence of the father or forfeiture of the father's authority by grave abuse, misconduct, or manifested unfitness, is it exercisable by the mother. Recent legislation has extended the grounds of forfeiture, systematized them and provided

204. Ibid. no. 1638.

205. Ibid. no. 1637.

206. French Civil Code, art. 372.

207. Planiol, *op. cit.* no. 1642.

208. Law of 15 November, 1921.

209. French Civil Code, art. 372.

210. Ibid. art. 373.

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for total or partial superseding of the authority by orders of a court.²¹¹ The authority extends to custody of the person, privilege of correction both chastisement and imprisonment, enjoyment of the income or usufruct of the child's property, and management of the child's property and affairs.²¹² But the privilege of chastisement has come to be much restricted. The privilege of locking up, fortified by a power of invoking the aid of a court for an order of detention of the refractory child has come to be limited so that there is commitment to a detention home for a limited time, and numerous projects have been urged for reforms on the lines familiar to us in the juvenile courts.²¹³ Also where the child is at work outside the household as a clerk or apprentice or the like his earnings are his own as are gifts made to him expressly excluding the parents.²¹⁴ Management of the child's property was regulated by legislation in 1910 which requires authorization by a court for all important dealings with it.²¹⁵

Like the French law, the provisions of the German Civil Code as to paternal power are based partly on the Roman *patria potestas* and partly on the Germanic right

211. 1 Planiol, *Manuel élémentaire de droit civil français* (12 ed. 1932) nos. 1731-1748.

212. *Ibid.* nos. 1664-1730.

213. *Ibid.* nos. 1666-1679.

214. French Civil Code, arts. 187, 387.

215. Planiol, *op. cit.* nos. 1714-1720.

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of wardship over infant children. The power does not extend beyond majority of the child. Also while as a general rule the power is exercised by the father, in some cases it is to be exercised with the mother's concurrence, and the father's power may be forfeited or suspended and a court may deprive him of custody of the child or of management of the child's property. It involves a power of agency, care of the child's person, care of the child's property, and, as in Roman law, right of usufruct of the child's property. But property given the child by testator or donor may be excepted by the terms of the gift from paternal power of management. The child's earnings are exempt from the right of usufruct.²¹⁶

In Germanic law the child, while living in the father's household, was in the wardship and power of the father. The father had management of and usufruct in the child's property but was liable for misuse. Coming of age did not affect the paternal power. But the power came to an end not only on death of the father but through passing out of the paternal household or through formal dissolution. A daughter went out of the household on marriage, a son when he set up a household of his own. But some of the later sources, especially the Frankish city laws, require a formal legal act by which the father cuts the son off from support. Thus the son might be emancipated even though he remained in the father's house.²¹⁷

Whether there was *patria potestas* over full grown sons in England before the Conquest is a controverted

216. German Civil Code, §§ 1626-1698. Cf. Swiss Civil Code, §§ 273-301.

217. Brunner, *Grundzüge der deutschen Rechtsgeschichte* (8 ed. 1930) § 54.

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and doubtful question.²¹⁸ At any rate, if it ever existed in England it had disappeared before the thirteenth century. There is no such thing in the common law system.²¹⁹

(iv) *Subjection to authority because of defect of will or of judgment.*

(1) *Infancy and minority.* Three ideas have obtained in the development of the law as to the guardianship of minors: Originally the continuity of the kin group;²²⁰ next, the conservation of the household property or kin-group property;²²¹ finally, in developed law the idea of protection of those unable or not yet fully able to look out for themselves. Thus the social interest in the protection of dependents gives shape to what had come down from kin-organized society.²²²

In Manu it is laid down thus: "The King shall protect the inherited (and other) property of a minor until he has returned (from his teacher's house) or until he has passed his minority."²²³ Hence Mayne tells us that "the Hindu law vests the guardianship of the minor in the sovereign as *parens patriae*" but that this duty is delegated to the child's relations, the father

218. 2 Pollock and Maitland, *History of English Law* (2 ed. 1898) 437.

219. *Ibid.* 438.

220. 1 Vinogradoff, *Historical Jurisprudence* (1920) 319.

221. Buckland, *Text-Book of Roman Law* (2 ed. 1932) 142.

222. See *ante*, § 96.

223. Manu, viii, 27 (Bühler's transl. 1886) 257.

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and mother being natural guardians.²²⁴ Any other relative will have authority from a court.²²⁵ The father can by will appoint a guardian and manager of his children and estate. If the court appoints one the nearest relative is preferred.²²⁶ But in case of a minor member of a joint family governed by the Mitakshara ²²⁷ none can be appointed unless he has separate property. His individual coparcenary interest is not property which may be managed by a guardian appointed by a court. But a guardian may be appointed to take care of his person.²²⁸ The power of a guardian appointed by a court is more limited than that of a natural guardian. The latter can, without the sanction of the court, alienate the property of the minor for the minor's benefit. A guardian appointed by a court cannot.²²⁹ Minority comes to an end at the beginning of the sixteenth year. Such is the doctrine of the Sanscrit writers and is the law in Bengal. But in some parts of India it terminates at the end of the sixteenth year.²³⁰

224. Mayne, *Hindu Law and Usage* (10 ed. 1938) 299. Sir William Markby considers this an interpretation of Manu in terms of English law. *Introduction to Hindu and Mahommedan Law* (1906) 97.

225. Mayne, *op. cit.* 299.

226. Sarkar, *Treatise on Hindu Law* (5 ed. 1906) 322. One question is who is entitled to exercise the power of giving a girl in marriage. *Ibid.* 148-149. Guardianship is now governed by the Guardians and Wards Act (Act VIII of 1890).

227. The eleventh-century commentary on Yajñavalkya (third-century *smṛiti*, i. e. tradition of the sages). The Mitakshara stands next to Manu in authority. It is the highest authority throughout India except in Bengal where it is superseded by the Dayabhaga where they differ, but is of high authority otherwise. Mayne, *Hindu Law and Usage* (10 ed. 1938) 47.

228. Sarkar, *Treatise on Hindu Law* (5 ed. 1906) 323.

229. *Ibid.*

230. Mayne, *Hindu Law and Usage* (10 ed. 1938) 297. The Indian Majority Act fixed majority at 21 where a guardian is appointed by a court (Act IX of 1875).

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In Greek law the father was κύριος of a minor or on the father's death a guardian who, if not appointed by the father's will was the nearest relative or in case of doubt was named by order of a magistrate. A provision attributed to Solon forbade the stepfather or the presumable heir of the ward from the guardianship.²³¹ But there is nothing to confirm this as to the latter and as to the former it is contradicted by the frequent happening that a dying man bequeaths his wife to a friend in order in that way to appoint them jointly guardians of the children. Also there is an ordinance of Thurii that the paternal relatives manage the property of an orphan but the maternal relatives take over the bringing up.²³² Usually both of these duties were in one person so that the guardian could provide for the widow and the children out of the property left by the deceased.²³³ As to management of the property, it was exempted from most public burdens for a year beyond the heir's coming of age. Legislation more or less provided for supervision of the guardian, sometimes providing a magistrate for that purpose or establishing a liability of the guardian to answer for mismanagement out of his own property.²³⁴ As to the time of coming of age, the legislation of the city-states differed. At Athens it was the same for family law and for political capacity—two years from puberty.²³⁵ In the time of the orators it was effected by enrollment in the register (λεξιάρχικον γραμματεῖον) which followed completion of the eighteenth year.²³⁶

231. Diogenes Laertius, i, 56.

232. Diodorus, xii, 15.

233. Harpocratio, s. v.

234. Hermann, *Lehrbuch der griechischen Rechtsaltertümer* (4 ed. by Thalheim, 1895) 13-17.

235. Aristotle, *Ath. Pol.* c. 42.

236. *Ibid.*

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In Roman law²³⁷ there were two types of guardianship of persons under age, *tutela impuberum* and *cura minorum*. It was a general rule that any one under the age of puberty and not in the *potestas* of an ascendant must have a *tutor*.²³⁸ Tutelage was at first, apparently, an extending of *potestas* until the child was capable of a household of his own with *potestas* in himself. Thus the *tutela* was in the interest of the guardian more than of the child, the *tutor* being the person who would take if the child died before puberty.²³⁹ When the child reached puberty his relatives could no longer have interests to be secured and so the *tutela* came to an end. As women could not have *potestas* they were in the older law in perpetual tutelage.²⁴⁰ Later this idea gave way to a conception of protection through guardianship.²⁴¹ *Tutors* might be statutory (*legitimi*) testamentary, fiduciary, or dative (*a magistratu datiui*). Statutory tutelage was based on the Twelve Tables.²⁴² If there was no testamentary *tutor* those who had not obtained puberty were to be in the *tutela* of their agnates, not of all of them, however, but of those in the nearest degree,²⁴³ who would be next in succession. Also in case of freedmen the *patronus* (master who had freed them) was statutory *tutor* by juristic reasoning from the provision of the Twelve Tables giving him the right of succession.²⁴⁴ Likewise testa-

237. Buckland, Text-Book of Roman Law (2 ed. 1932) 142-165; 2 Karlowa, Römische Rechtsgeschichte (1901) 271-292, 308-310; Mittels, Römisches Privatrecht (1908) 76-77; 3 Windscheid, Lehrbuch des Pandektenrechts (9 ed. 1906) 113-178.

238. Cod. v, 31, 2.

239. Inst. 1, 17, pr.; Cod. 5, 30, 5, 3.

240. Ulpian, Rules, xi, 1.

241. Ibid.

242. Gaius, 1, 155.

243. Ibid. 164.

244. Ibid. 165.

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mentary tutelage was by virtue of a provision of the Twelve Tables whereby *paterfamilias* could by will appoint *tutors* to those *impuberes* who became *sui iuris* on his death.²⁴⁵ The strict law required formal words of appointment.²⁴⁶ But the praetor would confirm a defective appointment.²⁴⁷ There were two forms of fiduciary tutelage. In one where on emancipation of a son by three sales if the purchaser in the third sale freed the son instead of selling him back to the father the manumitter was said to be quasi-patron and so *tutor*, but he was called fiduciary rather than statutory *tutor*.²⁴⁸ This was abolished by Justinian.²⁴⁹ The other case was where a parent by manumitting a daughter, granddaughter or great-granddaughter acquired statutory tutelage over her. His children became fiduciary *tutors*.²⁵⁰ If there was no statutory, testamentary, or fiduciary *tutor*, the magistrate would appoint one.²⁵¹ A relative or a friend might apply to have a *tutor* appointed, or if not, any one interested, after notice to relatives, might apply to the magistrate.²⁵² Originally *tutela* was a right (*ius*) of the agnates. It became a duty or burden (*onus*),²⁵³ and was said to be a *publicum munus* (public duty) so that one who was appointed was bound to serve unless disqualified or excused.²⁵⁴

245. Ulpian, Rules, xi, 14, 15.

246. Gaius, 1, 149.

247. Gaius, 1, 155; Inst. 1, 15, pr., Inst. 1, 20, 1; Dig. 26, 2, 10 pr. and 11, pr.

248. Gaius, 1, 166a, De Zulueta's ed. pp. 54-55.

249. Inst. 1, 12, 6.

250. Gaius, 1, 175.

251. Gaius, 1, 185; Ulpian, Rules, xi, 18; Inst. 1, 20, pr. But this was by virtue of legislation. Dig. 26, 1, 6, 2.

252. Dig. 26, 6, 2, pr.; 26, 6, 2, 3; Cod. 5, 31, 5.

253. Inst. 1, 17, pr.

254. Inst. 1, 25, pr.; Dig. 4, 5, 6, 7.

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In the classical era and in the maturity of Roman law the *tutor* did not have custody of the child. In case of controversy the magistrate determined²⁵⁵ it and the mother was considered the natural person to have custody.²⁵⁶ He had charge of the ward's interests of substance as a whole and had a further function of authorizing the ward's legal transactions (*auctoritatis interpositio*). Near the beginning of the fifth century, the age of seven was fixed as the time before which the infant had no capacity to act.²⁵⁷ After he had attained that capacity he could incur an obligation if he got the authority of the *tutor*.²⁵⁸ But legal transactions which could only benefit, not bind, the ward did not need the *tutor's* authority.²⁵⁹ Payment of what was due the ward might be made to the *tutor* with the sanction of a *iudex*.²⁶⁰

Tutela came to an end upon the ward's attaining puberty (fourteen for males)²⁶¹ and by death or impairment of legal personality (*capitis deminutio maxima or media*) of the *tutor*, but as to *capitis deminutio* only in case of statutory *tutors*.²⁶²

Protection of those under age against their inexperience and lack of judgment was carried further by the equitable remedy of

255. Dig. 27, 2, 1.

256. Cod. 5, 49, 1. The mother could not be tutor. Dig. 26, 1, 16. But this was modified later. Nov. 118, 5.

257. Dig. 23, 1, 14; 26, 7, 1, 2; Cod. 6, 30, 18. The passages in the Digest are held to be interpolated. Girard, *Manuel élémentaire de droit romain* (8 ed. 1929) 217, n. 3. Before the fifth century it was a question in each case how far the ward was able to act consciously.

258. Gaius, 3, 107.

259. Ibid. Also Gaius, 2, 83; Inst. 1, 21, pr.

260. Cod. 5, 37, 25.

261. Gaius, 1, 196. But in the time of Gaius the Sabinians held that it was a matter of actual physical development, not exact age. The rule fixing the exact age prevailed. Inst. 1, 22, pr.

262. Ulpian, Rules, ix, 9; id. ix, 17.

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restitutio, an avoidance of something which had prejudiced a person's substance or legal position, had by decree of the praetor upon application and after inquiry.²⁶³ A minor, that is a person under the age of twenty-five, on applying within a year after attaining that age might have restitution if he showed damage, there was no other remedy, and he had not ratified his action after coming of age.²⁶⁴ A later development was *cura minorum*, guardianship of persons not in *potestas* or in tutelage, between the age of puberty and twenty-five. It is considered to have begun with the *lex Plaetoria* in the latter part of the third century B.C.²⁶⁵ At first it seems to have been a right of one who had dealings with a minor to have a *curator* appointed for the particular transaction. In the second century a minor might apply for a *curator* who would be appointed for the whole time of minority.²⁶⁶ In the maturity of the law there was a tendency to assimilate *tutela* and *cura*, and so to appoint a *curator* as a matter of course, and to give the guardians an independent power of management instead of limiting them to consent or interposition of authority on the transactions of the minor. In Justinian's Institutes we read: "Males who have reached puberty and women who are marriageable receive *curators* until their twenty-fifth year is completed; for although arrived at puberty they are still of such an age that they cannot defend their own interests."²⁶⁷ The law had come to guardianship in the modern sense.

263. Dig. 4, 1, 1-3; Wenger, Institutes of the Roman Law of Civil Procedure (transl. by Fiske, 1940) 244-245.

264. Dig. 4, 4, 16; 4, 4, 1, 1; 4, 4, 19; Cod. 2, 24, 1; Cod. 2, 45, 1-2.

265. 2 Karlowa, Römische Rechtsgeschichte (1901) 305-310; Girard, Manuel élémentaire de droit romain (8 ed. 1929) 249; Cuq, Manuel des institutions juridiques des romains (1928) 227.

266. Dig. 4, 4, 1, 3.

267. Inst. 1, 22, pr.

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In France, originally the different *coutumes* had different rules as to the time of coming of age. The influence of the Roman law led to general adoption of twenty-five as the age of majority after the seventeenth century. But at the French Revolution in 1792 it was fixed by legislation at twenty-one and the Civil Code so provides.²⁶⁸

In French law a minor may be under paternal power, or he may be at the same time under paternal power and under the authority of a *tutor* (guardian), or in tutelage only, or he may be emancipated. After the age of twenty-one a person acquires full capacity which remains complete, save for supervening disabilities to be considered below, till the end of his life. As has been seen above the child until majority is under paternal power of the father and mother and, on the death of either, in the power of the survivor. But in that case is also put in tutelage, the surviving parent exercising at the same time paternal power and guardianship, since the child may have succeeded to property on the death of one of the parents and in any case is considered to need an equivalent for the protection afforded by the two parents. Where the surviving parent is also *tutor* he has along with him a supervising guardian (*tuteur subrogé*) to supervise the administration of the guardianship,²⁶⁹ and a family council, composed of parent, relatives or friends, presided over by a *juge de paix*, a kind of domestic tribunal to which the more important questions having to do with the person or the property of the minor are to be submitted.²⁷⁰ This family council is an institution of the customary law of the north of France, developed by and given great importance in the Civil Code. It obtains in derivation from or imitation of that code in Belgium, Italy, Spain and

268. French Civil Code, arts. 388, 488. Planiol, *Manuel élémentaire de droit civil français* (12 ed. 1932) no. 1615.

269. Planiol, *op. cit.* nos. 1865-1875.

270. *Ibid.* nos. 1770-1801.

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Switzerland.²⁷¹ The powers of this supervising guardian are carefully fixed by law and are less than those of the father. As security for his good administration the immovables of the *tutor* are subjected to a legal charge for the benefit of the minor.²⁷² After the death of the surviving parent the child passes under the power of another *tutor*, who may be an ascendant or a person designated by the will of the father or mother, or some one chosen by the family council.²⁷³ It will be seen that along with an institution of the Germanic customary law, French law retains something of the Roman idea of guardianship as a continuation of *potestas* after the death of *paterfamilias*.

A child may not have attained such age as to be capable of will for any act. Or it may be of an age for enough discernment for a wrong (delict) but not of enough judgment for a legal transaction. For those who have a general want of capacity, the law appoints a representative to act in their name and place. For those who have only partial incapacity the law provides some one to assist them and to authorize them in such acts as the law designates.²⁷⁴ In principle, minors not emancipated cannot of themselves perform any legal transaction. They are represented by their father or their *tutor*.²⁷⁵ The latter act in the name of the minor and do for his account any acts which may be necessary. The administration of guardianship by a *tutor* is more strictly supervised than that of the father. When it has to do with important acts concerning the person of the ward, such as education, or administration of the ward's patrimony (e.g. investment of capital, alienation of property, subjection of property to a charge or lien) the *tutor* cannot act without authoriza-

271. Ibid. no. 1771.

272. French Civil Code, art. 2121.

273. Ibid. arts. 397, 402, 405.

274. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 1627.

275. Ibid. arts. 389, 450.

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tion by the family council, which in some cases must be confirmed by a court.²⁷⁶ Transactions of the *tutor* within the limits of his powers or observing the prescribed formalities are binding upon the minor as if done for himself by a person of full age. When, on the contrary, the law has not been observed, the sanction applicable is very flexible and favorable to initiative on the part of the minor. In case of acts for which authorization by the family council is required, and has not been sought, they can be annulled by simple declaration that the legal forms have not been observed. As to acts which are within the powers of the *tutor*, such as management of property, making of leases, buying of objects serving for everyday life, they are not null even when they have been concluded by the minor alone. They can only be attacked by an action for rescission on the ground of injury (*lésion*), i.e. in case they have caused a prejudice to the ward. In practice, in consequence, the minor himself can make leases and bailments, can deal with tradesmen, and manage his property before he has come of age. Persons who contract with him in these acts of administration have no cause of fear so long as they do not abuse the inexperience of the minor. He can only challenge these transactions by showing that he has suffered an injury.²⁷⁷ This is expressed in the maxim: *Minor restituitur non tamquam minor sed tamquam laesus*.²⁷⁸

A minor who has reached the age of fifteen may be emancipated by his father and mother.²⁷⁹ He may be emancipated by the family council after the age of eighteen.²⁸⁰ That is, he may be freed from paternal power or tutelary authority or both.²⁸¹

276. Ibid. arts. 452-467.

277. Ibid. arts. 1305, 1311.

278. Fabreguettes, *La logique judiciaire et l'art de juger* (2 ed. 1926) 235.

279. French Civil Code, art. 477.

280. Ibid. art. 478.

281. Ibid. arts. 476-487.

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Likewise the minor is fully emancipated by marriage.²⁸² The emancipated minor enjoys a partial capacity (*demi-capacité*). He is regarded as in a status transitional from minority to majority; a sort of stage preparatory to complete capacity.²⁸³ Unlike the ordinary minor, the emancipated minor always acts in person. He carries out himself the legal transactions in which he is interested, sometimes wholly on his own motion, sometimes with the assistance of his *curator*, or sometimes with the formalities prescribed for those in tutelage, i. e. authorization of the family council and confirmation by the court.²⁸⁴ He has the free government of his person and the same capacity as one of full age for acts of pure management of his patrimony, i.e. acts which have for their purpose conservation of the property, taking its fruits and avails, leases, repairs and everyday expenses. He is not even protected by the action of rescission for injury (*lésion*). However, if he contracts excessive engagements out of proportion to his resources or if he makes thoughtless purchases the courts taking his fortune into consideration and the good or bad faith of the person who contracted with him, as well as the utility or inutility of the expenditures, may reduce the obligations he has assumed.²⁸⁵ As to acts which are not of pure administration, some are to be done with the assistance of the *curator*, others which are more serious such as alienation of immovables, borrowing money, pledges and mortgages, with the formalities prescribed for the minor in tutelage.²⁸⁶ The cases in which assistance of the *curator* is required are very few and failure to procure his assistance does not avoid the transaction. It remains valid unless it prejudices the minor. On the other hand,

282. Ibid. art. 470.

283. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 1983.

284. French Civil Code, arts. 481-487.

285. Ibid. art. 484.

286. Ibid. arts. 483, 484.

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where authorization by the family council or analogous forms are required failure to comply with the requirement makes the transaction avoidable in an action of nullity. Thus in practice the role of the *curator* is reduced to almost nothing.²⁸⁷

In German law,²⁸⁸ as a general proposition, all persons who have not attained the age of twenty-one are infants.²⁸⁹ An infant under the age of seven has entire want of capacity for acts. Over the age of seven he has restricted capacity.²⁹⁰ But a court may declare a person who has attained the age of eighteen to be of full age if the minor and the person exercising parental power over him agree and the court finds that such declaration will be of advantage to him.²⁹¹ At least one guardian must be appointed for any infant who is not subject to parental power or whose person and property are not under the care and management of either parent.²⁹² A supervising guardian must also be appointed in every case where the ward's property is of substantial value unless a parent having the infant in parental power has named a guardian by will or there is a grandfather qualified and willing to act and the father or mother by will has directed that there be no supervising guardian.²⁹³ The family council is of much less importance than in France. Supervision of guardianship is committed in general to the guardianship court. But if either parent so directs or the court considers it advisable, a family council may be appointed. It consists of the judge of the court and from

287. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 2017.

288. Schuster, *Principles of German Civil Law* (1907) §§ 27, 93-94, 440-467; 1 Cosack, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) §§ 30, 78, 80; 2 *id.* (7 & 8 ed. 1924) §§ 100-108.

289. German Civil Code, § 5.

290. *Ibid.* §§ 104, 105.

291. *Ibid.* §§ 3-5.

292. *Ibid.* § 1773.

293. *Ibid.* §§ 1792, 1852, 1855.

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two to six other members. If appointed, it has the functions otherwise belonging to the guardianship court.²⁹⁴ It is used chiefly where the minor has commercial interests or interests in industry which require technical knowledge or experience of the calling. In the Netherlands there is a system intermediate between the French and the German. There is a family council as a matter of right in every guardianship, but its role is less than in France. The judge may dispense with the advice of the parents in appointing a guardian,²⁹⁵ and the judge gives the guardian such authorization as may be required in the course of administration. The advice of the parents or of a family council is only called for in a few cases and then only in the way of consulting them.²⁹⁶

Under the German Civil Code the court in appointing a guardian or supervising guardian must follow a prescribed order of priority among the persons who may be called upon to act. First, stands the person nominated by the will of the minor's father; next, the one nominated by the will of the minor's mother; next, the minor's paternal grandfather, and, finally, his maternal grandfather. Except where there is incapacity, disqualification, or a finding that appointment of the person named or next in order would be detrimental to the interest of the ward, this order must be followed.²⁹⁷ The guardianship court has general control of guardianships and is required to supervise exercise of the powers by guardians and prevent breaches of duty by them.²⁹⁸ It may order the removal of the ward to a family or a school or a reformatory much as a juvenile court may do in the United States.²⁹⁹

294. *Ibid.* §§ 1858-1859.

295. Netherlands Civil Code, art. 416.

296. *Ibid.* arts. 446, 447, 451, 454.

297. German Civil Code, §§ 1778, 1897.

298. *Ibid.* §§ 1837, 1897.

299. *Ibid.* § 1838.

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Every male German is bound to accept the office of guardian or supervising guardian unless excused on grounds specified in the code. He is liable for any damage to the ward through delay caused by his refusal to act and is subject also to fine therefor.³⁰⁰ The duties must be performed without remuneration unless the court directs otherwise, as, for example, where the extent of the property and difficulties of administering it make remuneration just and reasonable.³⁰¹ A guardian has the same rights and duties as a parent exercising parental power except that he has no right of usufruct of the ward's property. But his powers are much more restricted than those of a parent, particularly where a supervisory guardian is appointed. Also his powers may be modified by order of the guardianship court or of a donor or testator from whom the ward receives property.³⁰² He is the ward's statutory agent. The restrictions on his power of agency are the same as those to which a parent exercising parental power is subject.³⁰³ But there are important differences between a guardian's and a parent's powers of management. A parent, if entitled to the usufruct of the child's property, can use the income for his own purposes and even use consumable things which are part of the corpus of the property. A guardian cannot use any part of the income or of the corpus of the property for his own purposes and must invest all income not required for necessary expenses.³⁰⁴ In selecting an investment he must obtain the authorization of the supervising guardian or leave of the court.³⁰⁵ A parent exercising parental power can dispose of or give a valid release of or discharge for any personal claim or negotiable

300. Ibid. §§ 1785-1788.

301. Ibid. § 1915.

302. Ibid. §§ 1793, 1794, 1803, 1885, 1897.

303. Ibid. §§ 1795, 1796, 1897, 1915.

304. Ibid. §§ 1805, 1806, 1897.

305. Ibid. §§ 1810, 1821, 1897.

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instrument which is part of the child's property. A guardian, as a rule, cannot do these things without concurrence of a ratification by the supervising guardian or leave of court.³⁰⁶ There is a much larger category of transactions requiring leave of the court in case of a guardian acting for a ward than in that of a parent acting for a child. But the court may grant a general leave for some kinds of acts.³⁰⁷ It will be noticed that the German Civil Code, like the French, keeps not a little to the notion of a guardian as taking the place of one who had parental power over a child.

Where a person of entire incapacity for acts makes a declaration of intention, i.e. a declaration of intention to bring about a possible and legally permissible result, obviously it is simply void. The law cannot give it effect.³⁰⁸ However, his statutory guardian has power to act for him although in some cases the statutory agent must get leave from the guardianship court or consent of the supervising guardian. On the other hand, a person of restricted capacity can do valid acts in the way of legal transactions with the consent of his statutory agent. Without such consent they are as a rule invalid. But there are in German law a few acts which can be done by a person of restricted capacity without the consent of his statutory agent. One is an act by which he receives a benefit without giving anything in exchange for it. Another is any act which he does in the exercise of a trade carried on with the assent of the statutory agent and the leave of the guardianship court unless it is one which in itself requires special leave of that court. Still another is one done by him in pursuance of a general authority given by the statutory agent to enter into personal services unless it is of a kind requiring leave of the guardianship court. Likewise after at-

306. Ibid. §§ 1809, 1812, 1813, 1832, 1912.

307. Ibid. §§ 1821-1823.

308. German Civil Code, § 105.

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taining the age of sixteen the person of restricted capacity may make a testamentary disposition by oral declaration before a notary or a judicial officer.³⁰⁹ Consent may be given by prior authorizing or by subsequent ratification.³¹⁰ One whose interests are intended to be affected by a unilateral act of a person of restricted capacity may refuse to be bound unless written authority of the statutory agent is shown him or he had notice from the statutory agent that the latter authorized the act.³¹¹ Also a party to an agreement with a person of restricted capacity made by the latter without authorization by the statutory agent may require the statutory agent to ratify the agreement within fourteen days. If there is no declaration of ratification within that time it is deemed unauthorized and unratified. But if the restriction comes to an end or is removed within that time the one who made the agreement may himself ratify it.³¹² If restricted capacity of a contracting party is unknown to the other party, or it is falsely represented to the latter that authority has been given, the party misled by his ignorance or by the misrepresentations may if he so chooses withdraw from the agreement.³¹³

In the Anglo-American common law³¹⁴ a person is said to be an infant until he has attained majority, that is, the age of twenty-one years. An infant has entire capacity for rights and so may own property and acquire it by descent or in any way not

309. Ibid. §§ 107, 112-114, 2229, 2238.

310. Ibid. § 110.

311. Ibid. §§ 111, 114.

312. Ibid. §§ 108, 114.

313. Ibid. §§ 109, 114.

314. 1 Blackstone, *Commentaries on the Laws of England* (1765) 460-466; 2 Kent, *Commentaries on American Law* (1827) 219-245; Tiffany, *Law of Persons and Domestic Relations* (3 ed. 1921) §§ 192-224; 1 Spence, *History of the Equitable Jurisdiction of the Court of Chancery* (1846) 605-617; Lou, *Juvenile Courts in the United States* (1927); see also Clarke Hall and Morrison, *Law Relating to Children and Young Persons* (3 ed. 1947).

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involving a legal transaction on his part. On the other hand, he cannot bring or defend legal proceedings by himself and so has privileges or exemptions from rules that govern persons *sui juris*.³¹⁵ If he claims redress for a wrong done him, he must sue by his guardian or next friend, i. e. some person who is willing to undertake the action on his behalf and incur the risk of liability for costs. In consequence of this disability to sue, the infant is not held to the rules as to time of asserting his claims and negligence in not ascertaining and acting on his rights which obtain as to persons of full age. The statute of limitations does not begin to run against him nor does the time of adverse possession begin to be reckoned against him until he comes of age. Also the infant cannot be sued at common law except by joining his guardian, who is bound to protect him against legal no less than physical attacks.³¹⁶ As to legal transactions there is only a partial capacity. Originally it was held certain legal transactions by infants were wholly invalid, that is, incapable of being ratified when the infant came of age.³¹⁷ Such was said to be the case where the court could definitely pronounce the transaction prejudicial to the infant. But it has come to be held generally that an infant is sufficiently protected if his transactions, other than contracts for necessities, are held voidable, i.e. subject to his decision, when he comes of age, whether or not to abide them.³¹⁸ This is undoubted in case of conveyances, sales, purchases, and acquisitions of property while under age.³¹⁹ As to appointments of agents, the older cases regarded them as wholly void.³²⁰ But the tendency now is to leave to the infant when he comes of age

315. 1 Blackstone, Commentaries (1765) 464.

316. Ibid.

317. Keane v. Boycott, 2 H.Bl. 511 (1795).

318. Whitney v. Dutch, 14 Mass. 457 (1817).

319. Zonch v. Parsons, 3 Burr. 1794 (1765).

320. Saunderson v. Marr, 1 H.Bl. 75 (1788).

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the question of benefit or prejudice.³²¹ As to contracts, if they are for necessities they are binding.³²² If not they are to be avoided or ratified by the infant as he may determine when he comes of age.³²³ Necessaries are those things which are reasonably needed for the subsistence, health, and education of the infant, considering his property and station in life.³²⁴ As to ratification, if there is a promise to do some one act, or a promise wholly to be performed in the future, it does not bind the infant until he ratifies it on coming of age. If, on the other hand, the contract has been performed or involves continuing rights and duties, it is valid until he disaffirms it.³²⁵

Infants are liable civilly the same as adults for the wrongs they commit.³²⁶ They, not their parents, are liable, and this goes so far at common law that if an infant commits a wrong by the authority or command of the parent, the parent is also liable but the infant is not excused from civil liability.³²⁷ If, however, the wrong grows out of a breach of contract, so that in case of an adult there could be an action either upon contract or upon tort, the infant cannot be held since the effect would be to enforce the

321. *Whitney v. Dutch*, *supra* n. 318, and note to the case in *McCurdy, Cases on the Law of Persons and Domestic Relations* (1927) 1005-1014.

322. *Ive v. Chester*, *Cro.Jac.* 560 (1621).

323. *Williams v. Moor*, 11 *M. & W.* 256 (1843); *Lemmon v. Beeman*, 45 *Ohio St.* 505, 15 *N.E.* 476 (1888).

324. *Hands v. Slaney*, 8 *T.R.* 578 (1800); *Peters v. Fleming*, 6 *M. & W.* 42 (1840); *Breed v. Judd*, 1 *Gray* (Mass.) 455 (1854).

325. *Tobey v. Wood*, 123 *Mass.* 88 (1877); *Goode v. Harrison*, 5 *Barn. & Ald.* 147 (1821).

326. *Campbell v. Stakes*, 2 *Wend. (N.Y.)* 137 (1828); *Bullock v. Babcock*, 3 *id.* 391 (1829); *Scott v. Watson*, 46 *Me.* 362 (1859); *Huchting v. Engel*, 17 *Wis.* 230 (1863).

327. *Tift v. Tift*, 4 *Den. (N.Y.)* 175 (1847); *Paul v. Hummel*, 43 *Mo.* 119 (1868); *Moon v. Towers*, 8 *C.B.N.S.* 611 (1860).

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contract.³²⁸ Also where malice, i.e. intention to injure as distinguished from a trespass upon person or property, is an element of the wrong, whether or not the infant may be held civilly depends upon whether he is of sufficient age so that malice may be imputed to him.³²⁹

As to criminal responsibility, the common-law writers took over and applied somewhat differently the Roman doctrine as to capacity to act, and laid down that under the age of seven there could be no criminal intent, that between seven and fourteen there was a presumption of incapacity for criminal intent which could be rebutted by showing such capacity and intent did exist in a particular case, and that over the age of fourteen such capacity was presumed.³³⁰ Many states raised the age below which there is no capacity for crime, some to nine years,³³¹ some to ten.³³² But in the present century the whole subject has come to be treated very differently under recent juvenile court legislation, which puts juvenile delinquents under the jurisdiction of equity over infants rather than of the criminal courts.³³³

328. *Johnson v. Pie*, 1 *Lev.* 169 (1660); *R. Leslie, Ltd. v. Sheill*, [1914] 3 *K.B.* 607; *Jennings v. Rundell*, 8 *T.R.* 335 (1799); *Wilt v. Welsh*, 6 *Watts* (Pa.) 9 (1837).

329. *Cooley*, *Torts* (2 ed. 1888) 120, (Throckmorton's ed. 1930) § 47. Some cases hold there is "inevitable accident" rather than trespass in case of very young infants unable to be intelligent actors. *Briese v. Maechtle*, 146 *Wis.* 89, 130 *N.W.* 893, 35 *L.R.A., N.S.*, 574 (1911).

330. *Hale*, *Pleas of the Crown* (1678) 25-26; 4 *Blackstone*, *Commentaries* (1769) 23.

331. *E. g.* *Texas. Wusnig v. State*, 33 *Tex.* 651 (1871).

332. *E. g.* *Illinois. Angelo v. People*, 96 *Ill.* 200 (1880).

333. *National Probation and Parole Assn., Juvenile Court Laws of the United States* (2 ed. 1939); *id.* *Standard Juvenile Court Act* (1943). As to Great Britain, see *Watson, British Juvenile Courts* (1948); *Mumford, A Guide to Juvenile Court Law* (2 ed. 1947); *Giles, The Juvenile Courts, Their Work and Problems* (1946).

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In the older law there were a number of forms of guardianship of infants depending on the tenure by which property was held. If held by knight service,³³⁴ the lord³³⁵ was entitled to custody of the person of the heir and of his lands until he reached the age of twenty-one. As the lord had to provide a substitute to do the services required by the tenure, he could take to his own use all the profits, although subject to a duty of suitably maintaining the heir and bringing him up. Tenure by knight service and this form of guardianship were abolished in 1660.³³⁶ In case of tenure in socage no substitute to perform the services was required, so guardianship belonged to the nearest relation to whom the inheritance could not descend.³³⁷ But he took the profits not to his own use but to the use of the heir and the heir could bring an action of account against him.³³⁸ The guardian in socage had no right as such with respect to the chattels of the minor. As to copyhold lands,³³⁹ there was guardianship by custom of the manor. Here the guardian could not take the profits to his own use.³⁴⁰ As to the person of the infant, the father was "guardian by nature" till the age of twenty-one was attained, and the father and mother were "guardians by nurture" until fourteen.³⁴¹

In the law of today this has been superseded by the development of guardianship through the equitable jurisdiction of

334. That is by serving with the King forty days in the year "well and conveniently arrayed for the war." Littleton, *Tenures*, § 95.

335. After 1290, the King.

336. Stat. 12 Car. 2, chap. 24.

337. Littleton, *Tenures*, § 123.

338. *Ibid.*

339. Tenure of land in a manor by copy of court roll. *Ibid.*, § 73.

340. Co.Lit. 89b (1628).

341. *Ibid.* 88b; 1 Blackstone, *Commentaries on the Laws of England* (1765) 461.

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chancery. At common law the King, and so in the United States, the state is said to be *parens patriae*, in the position of a father or patriarchal head of a group of kindred and so to have a general power and duty as to dependents and defectives. This power and duty was exercised through the Court of Chancery.³⁴² Hence although parents are the natural guardians of their children, the court, in case of cruelty, neglect, or ill treatment, or bad character of the parent, or, where the infant had property of his own, there was insolvency or mismanagement endangering the property, would appoint a guardian of property or of the person or both.³⁴³ In the United States, as a rule, courts of equity do not exercise this jurisdiction except where they have been given jurisdiction of divorce and matrimonial causes and exercise it in connection therewith. Usually it is committed to probate courts or analogous tribunals.³⁴⁴ Recently juvenile courts have generally been given the equitable jurisdiction of the Court of Chancery as to custody of the person of children under a certain age (usually eighteen) in order to deal with juvenile delinquency and to deal preventively with conditions conducing thereto.³⁴⁵

Power of the father to constitute a guardian by deed or will was given by statute in England³⁴⁶ and this has been followed generally, at least as to testamentary guardians, in the United States.³⁴⁷

342. 1 Spence, *History of the Equitable Jurisdiction of the Court of Chancery* (1846) 611-615.

343. 2 Story, *Equity Jurisprudence* (13 ed. 1886) §§ 1337-1349.

344. Pound, *Organization of Courts* (1940) 78-80.

345. See *supra*, note 333.

346. 12 Car. 2, chap. 24 (1660).

347. 2 Kent, *Commentaries on American Law* (1827) 224-226.

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(2) *Insanity and idiocy*.³⁴⁸ In Roman law the Twelve Tables provided that lunatics (*furiosi*), i.e. insane persons who might have lucid intervals, should be in the *cura* of their agnates or if none then of the *gentiles*, members of the *gens* or clan.³⁴⁹ Also the praetor would appoint a curator in such cases and in the case of idiots, the deaf and dumb, and those afflicted with chronic disease so that they could not manage their own affairs.³⁵⁰ The curator of an insane person had custody of his person. Otherwise the curator had functions like those of the tutor of a person under puberty, but the Twelve Tables gave him power to alienate the lunatic's property in the course of management of his affairs.³⁵¹

In Germanic law likewise the kin group as a whole had guardianship of the insane and of idiots and feeble minded.³⁵²

In French law, lunatics and imbeciles are put under interdiction by judgment of a court, and this of itself establishes want of capacity for legal transactions.³⁵³ He is given a tutor and his status is like that of a minor.³⁵⁴ The rules of law with respect to tutelage of minors apply also to tutelage of persons interdicted.³⁵⁵ But whereas the minor is only relieved from his legal transactions by showing that he has been injured, an interdicted

348. Buckland, *Text-Book of Roman Law* (2 ed. 1933) 168-169; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 2038-2059, 2074-2116; 1 Blackstone, *Commentaries on the Laws of England* (1765) 302-306; 1 Spence, *History of the Equitable Jurisdiction of the Court of Chancery* (1846) 618-620.

349. 1 Bruns, *Fontes Iuris Romani Antiqui* (7 ed. 1909) 23.

350. *Inst.* 1, 23, 3-4.

351. Gaius, 2, 64; *Dig.* 27, 10, 17.

352. Brunner, *Grundzüge der deutschen Rechtsgeschichte* (8 ed. 1930) § 55, p. 231.

353. French Civil Code, arts. 6, 104.

354. *Ibid.* art. 509.

355. *Ibid.*

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lunatic is without any capacity. His acts are annulled for want of an essential element of validity.³⁵⁶ If he has not been interdicted, the legal transactions of the lunatic are voidable, except that the heirs of a deceased insane person not interdicted can only attack the legal transactions of the deceased if the proof of insanity is drawn from the act itself,³⁵⁷ or in case of a gift or a will,³⁵⁸ or where the insane person died pending proceedings for an interdict.³⁵⁹

Under the German Civil Code a person "in a condition of morbid disturbance of mental activity incompatible with a free determination of the will" ³⁶⁰ or who has been interdicted for insanity has no capacity for acts.³⁶¹ A declaration of intention of a legal transaction by such a person is void.³⁶² A person may be interdicted, that is judicially reduced to the status of a minor, if because of insanity or feeble mindedness he is unable to manage his affairs.³⁶³ Where a person of full age is interdicted a guardian is appointed for him.³⁶⁴ In general, the provisions as to guardianship of a minor are made applicable to guardianship over a person of full age, but the father and mother of the ward are not entitled to nominate a guardian nor to exclude any person from the guardianship.³⁶⁵

356. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 2082.

357. French Civil Code, art. 504.

358. *Ibid.* art. 901.

359. *Ibid.* art. 504. See Planiol, *op. cit.*, nos. 2074-2077.

360. German Civil Code (Wang's transl. 1907) § 104(2).

361. *Ibid.* § 104(3).

362. *Ibid.* § 105.

363. *Ibid.* § 6.

364. *Ibid.* § 1896.

365. *Ibid.* §§ 1897, 1898.

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In England, the common law draws a distinction between the lunatic and the idiot or "natural fool."³⁶⁶ In the time of Edward I, the King claimed wardship of the lands of all natural fools not regarding of whom the lands were held. He was said to be morally bound to maintain idiots out of the profits of their lands. Originally, apparently, the lord was entitled to the wardship and it is believed that the King's prerogative was established by some statute or ordinance in the latter part of the reign of Henry III.³⁶⁷

As to lunatics, the so-called statute *De Praerogativa Regis* lays down that the King shall provide that the lands and tenements of the insane be kept safely without waste and destruction; that the King shall provide for the custody and sustentation of lunatics out of the profits and take nothing for his own use. The lands were to be returned to them when they came to their right minds and if they died insane the residue of the profits was to be distributed "for their souls by the advice of the ordinary"³⁶⁸ or, as later legislation provided, passed to their executors or administrators.³⁶⁹

Thus the insane are under the protection of the King, or, in the United States, of the state. They have no capacity for legal transactions, since such acts require will and judgment. When persons have been judicially declared insane and placed under guardianship, transactions which they attempt are wholly

366. 1 Blackstone, Commentaries on the Laws of England (1765) 302.

367. 1 Pollock & Maitland, History of English Law (2 ed. 1898) 481.

368. Statute *De Praerogativa Regis*, chap. 10. As to this supposed statute which stands in the Statutes at Large as 17 Edw. 2, stat. 1 (1324) see 1 Pollock & Maitland, History of English Law (2 ed. 1898) 481; 1 Holdsworth, History of English Law (6 ed. 1938) 478, n. 8. Its true date seems to be between 1255 and 1290.

369. Statute of Distributions, 12 Car. 2, chap. 10 (1670).

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void.³⁷⁰ If not so adjusted by what has become the prevailing view, contracts and transfers of property which they make while incapable of understanding their nature and effect are voidable.³⁷¹ But if the other party acted in good faith without knowledge or notice of the insanity and the contract has been so far carried out that the *status quo* cannot be restored it is binding.³⁷² Also contracts are binding when for necessities furnished the insane person or, as is generally held, to his wife and children.³⁷³ Likewise an insane person is liable to make restitution for unjust enrichment or, as formerly put, upon quasi contract.³⁷⁴ Where the contract of an insane person is voidable, he may himself disaffirm or ratify on becoming sane or this may be done by his guardian during his insanity or by his personal representative (i. e. executor or administrator) after his death.³⁷⁵

For torts (wrongs) which do not involve a mental element (trespass, assault, nuisance) an insane person is liable as a normal person would be.³⁷⁶ But the rule is otherwise if the tort is one involving "malice," that is, an actual intention to do the

370. In re Walker, [1905] 1 Ch. 160; Hughes v. Jones, 116 N.Y. 67, 73, 22 N.E. 446, 448, 5 L.R.A. 637 (1889).

371. Reed v. Mattapan Deposit & Trust Co., 198 Mass. 306, 314, 84 N.E. 469, 471 (1907); Miller v. Barber, 73 N.J.L. 38, 62 A. 276 (1905); Blinn v. Schwarz, 177 N.Y. 252, 69 N.E. 542 (1904); Luhrs v. Hancock, 181 U.S. 567, 21 S.Ct. 726, 45 L.Ed. 1005 (1901).

372. Molton v. Camroux, 4 Ex. 17 (1849).

373. Baxter v. Portsmouth, 5 B. & C. 170 (1826); Sceva v. True, 53 N.H. 627 (1873); Drew v. Nunn, 4 Q.B.D. 661 (1879).

374. Sceva v. True, *supra* n. 373.

375. Gibson v. Western N. Y. & Pa. R. Co., 164 Pa.St. 142, 30 A. 308 (1894); Bullard v. Moor, 158 Mass. 418, 33 N.E. 928 (1893); Downham v. Holloway, 158 Ind. 626, 64 N.E. 82 (1902); Baldwin v. Smith [1900] 1 Ch. 588; Eldredge v. Palmer, 185 Ill. 618, 57 N.E. 770 (1900).

376. Weaver v. Ward, Hob. 134 (1616); Morain v. Devlin, 132 Mass. 87 (1882); Williams v. Hays, 143 N.Y. 442, 38 N.E. 449, 26 L.R.A. 153 (1894); Young v. Young, 141 Ky. 76, 132 S.W. 155 (1910).

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known wrong, such as malicious prosecution.³⁷⁷ As to crimes, at common law a crime requires two elements, act and intent. If because of mental disease either of these elements is lacking, there cannot be criminal responsibility if the theory is logically carried out. But the English and a majority of American courts go on the intent element only and make ability or inability to distinguish right from wrong the decisive point.³⁷⁸

In England, on petition of the Attorney General or of some friend of the insane person, a writ *de lunatico inquirendo* issued from chancery to determine whether or not the person was insane and to provide for security of his person and property. Guardianship was entrusted to some one called a committee.³⁷⁹ But today under the Lunacy Acts ³⁸⁰ jurisdiction is exercisable by the Lord Chancellor and the Lords Justices of the Court of Appeal and is spoken of as the jurisdiction of the judge in lunacy. In the United States the person to whom custody of person and property is committed is more usually called a guardian, or in some states a conservator, and is appointed on petition of a relative or of a public officer, as provided by statute, usually by a

377. This, however, is laid down more by the text writers than by the decisions. Pollock, *Torts* (14 ed. 1939) 49; Cooley, *Torts* (Throckmorton's ed. 1930) § 45; Townshend, *Slander and Libel* (4 ed. 1890) § 248. See 4 American Law Institute, *Restatement of the Law of Torts* (1939) § 887, comment *a*.

378. *M'Naghten's Case*, 10 Cl. & F. 200 (1843); *R. v. Ronald True*, 16 Cr. App.R. 164 (1922); *Flanagan v. People*, 52 N.Y. 467 (1873). But see *Com. v. Rogers*, 7 Met. (Mass.) 500 (1844); *Dacey v. People*, 116 Ill. 555, 6 N.E. 165 (1886); *State v. Pike*, 49 N.H. 399 (1870); *Parsons v. State*, 81 Ala. 577, 20 So. 854 (1886). For recent English discussion see Report of the Committee on Insanity and Crime, Appendix IV to Carswell, *Trial of Ronald True* (1922) 276-294.

379. 1 Spence, *History of the Equitable Jurisdiction of the Court of Chancery* (1846) 618-619.

380. 53 & 54 Vict. chap. 5 (1890); 54 & 55 Vict. chap. 65 (1891); 8 Edw. 7, chap. 47 (1908).

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probate court or court of probate jurisdiction, or by a court of equity, as in case of infancy.

As to idiots, the statute *De Praerogativa Regis*, or as Coke thought an earlier statute,³⁸¹ gave their custody to the King with the profits of their lands, so that the crown had a beneficial interest in the wardship.³⁸² Blackstone treats of idiots under the King's revenue.³⁸³ But the King's beneficial interest extended only to the profits during the life of the idiot. The King was to provide necessities out of the profits and on death of the idiot to return the lands to the idiot's heirs.³⁸⁴ There was a procedure by writ *de idiota inquirendo* or by commission to inquire into the mental condition of the person in question, resulting in appointment of a committee, as in case of lunacy.³⁸⁵ English legislation maintained the distinction between idiots and lunatics as late as the Idiot's Act of 1886.³⁸⁶ But under the Lunacy Acts of 1890 and following³⁸⁷ the distinction has lost its importance.³⁸⁸ In the United States a committee or guardian or conservator is appointed by the same court and in the same way as in case of a lunatic.

(3) *Prodigality*.³⁸⁹ In Roman law a prodigal (*prodigus*), one who squandered property received from his ancestors on intestacy, was in the *cura* of his agnates under a provision of

381. 1 Second Institute (1642) 14.

382. Matter of Fitzgerald, 2 Scho. & Lef. 432, 436-437 (1805).

383. 1 Commentaries on the Laws of England (1765) 303.

384. Statute De Praerogativa Regis, § 9.

385. 1 Blackstone, op. cit. 303.

386. 49 & 50 Vict. chap. 25.

387. *Supra* n. 380.

388. Re Mark Wholley, [1906] 1 Ch. 565.

389. 2 Karlowa, Römische Rechtsgeschichte (1901) 302-306; Buckland, Text-Book of Roman Law (2 ed. 1932) 168-169; Cuq, Manuel des institutions Juridiques des romains (1928) 225-227; 1 Windscheid, Pandekten (1906) § 71, pp. 329-333; Wright, The Law of Prodigals (1900) 16 Law Quart.Rev. 57.

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the Twelve Tables.³⁹⁰ Where property came to the *prodigus* otherwise than from his ancestors upon intestacy, the praetor in all cases of a rooted propensity to frivolous squandering, not merely of income but of the corpus of one's property, in a person of sound mind and otherwise perfect capacity, interdicted the *prodigus* from management of his affairs and appointed a *curator*.³⁹¹ As *prodigi* were of age and sane, all their acts up to the interdiction were valid and they could acquire and commit delicts because they had capacity for acts although after interdiction restricted capacity for legal transactions. They could do acts which were not prejudicial to their estate much as a minor could.³⁹² Alienation was restricted as in case of a lunatic.³⁹³

Interdiction of prodigals is retained in the law of Continental Europe. In France, the matter is provided for by the Civil Code.³⁹⁴ A prodigal is said to be one who dissipates his fortune by excessive and foolish expenditures.³⁹⁵ He is put under the tutelage of a *conseil judiciaire*, i. e., adviser, without whose formal approval he cannot litigate, compromise, borrow money, receive movable property or give a discharge therefor, or alienate or hypothecate his property.³⁹⁶

Louisiana kept the interdiction of persons of feeble mind³⁹⁷ but the code forbids interdiction of prodigals.³⁹⁸ In 1890, a statute provided for interdiction of habitual drunkards.³⁹⁹

390. Ulpian, Rules, xii, 1.

391. Id. xii, 3; Paul, Sententiae, lli, 4A, 7.

392. Dig. 12, 1, 9, 7; 27, 10, 10, pr.; 45, 1, 6.

393. Cod. 5, 70, 2.

394. French Civil Code, art. 513.

395. 1 Aubry et Rau, Droit civil français (5 ed. 1897) 862.

396. French Civil Code, arts. 499, 513; 1 Planiol, Traité élémentaire de droit civil (12 ed. 1932) nos. 2125-2130.

397. French Civil Code, art. 489; Louisiana Civil Code, arts. 32, 422.

398. Louisiana Civil Code, art. 426.

399. Act 100 of 1890, p. 116.

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The German Civil Code ⁴⁰⁰ allows interdiction on three grounds: (1) Insanity or feeble mindedness, (2) prodigality which exposes the prodigal himself or his family to the danger of want, (3) habitual drunkenness which makes him incapable of managing his own affairs, or exposes him or his family to the danger of want, or endangers the safety of others.

There is no such category known to the common law.⁴⁰¹ But in 1783 Massachusetts provided for appointment of a guardian of any person who "by excessive drinking, gaming, idleness, or debauchery of any kind" shall so spend or waste his estate as to expose himself or his family to want or expose the town in which he is settled to charge or expense of maintaining them.⁴⁰² Like legislation as to spendthrifts is to be found in all the New England states,⁴⁰³ and a few other states have similar statutes.⁴⁰⁴ State legislation as to guardianship of habitual drunkards is general.⁴⁰⁵

(f) *Conditions of capacity or incapacity responding to public interests and the social interest in political*

400. German Civil Code, §§ 6, 1896. The Swiss Civil Code provides for appointment of a guardian for "every person of full age who by reason of his prodigality, drunkenness, immorality, or the mismanagement of his affairs exposes himself or his family to the risk of being reduced to poverty or want, or needs permanent care or supervision, or is a danger to the community." § 370.

401. *Re Selot's Trust*, [1902] 1 Ch. 488.

402. Mass. Acts and Resolves, 1783, chap. 38, § 7.

403. See *Chalker v. Chalker*, 1 Conn. 79 (1814); *Young v. Young*, 87 Me. 44, 32 A. 782 (1894); *Hawkins v. Learned*, 54 N.H. 333 (1874); *Hamilton v. North Providence Probate Ct.*, 9 R.I. 204 (1869); *Ellis v. Cramton*, 50 Vt. 608 (1878).

404. See *Reeves v. Hunter*, 185 Iowa 958, 962, 171 N.W. 567, 569 (1919); *Sheldon v. Eakle*, 251 Ill. 369, 96 N.E. 246 (1911); *Cannon v. Robinson*, 95 Okl. 89, 218 P. 872 (1923); *In re Barker*, 83 Or. 702, 164 P. 382 (1919); *In re Reed*, 173 Wis. 628, 182 N.W. 329, 17 A.L.R. 1063 (1921).

405. *Woerner, American Law of Guardianship* (1897) 379-380.

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institutions. We may refer to this category special capacities or immunities attaching to persons by reason of official position.

In the maturity of Roman law the emperor was said to be *legibus solutus*.⁴⁰⁶ At first the emperor, as chief magistrate, was bound by laws. But from the third century both as official and as individual he was considered above the law.⁴⁰⁷ One may say the same of the King in the French monarchy of the old regime. "The Roman Empire had been the most absolute monarchy that had ever been and men strove to make the French monarchy in its image."⁴⁰⁸ As to the English common law, Blackstone treats of the king under the law of persons, considering that beyond his political powers and authority, in order that the people may pay him "that awful respect which may enable him with greater ease to carry on the business of government," the law ascribes to him certain qualities as inherent in his royal capacity "superior to those of any other individual in the nation."⁴⁰⁹ Sovereign rulers also have immunity in other lands than their own on the ground that "it would be absolutely inconsistent with the status of an independent sovereign that he should be subject to the process of a foreign tribunal."⁴¹⁰

Under the Constitution of the United States, senators and representatives are in "all cases except treason, felony, and breach of the peace privileged from arrest during their attendance at the session of their respective houses and in going to

406. Dig. 1, 3, 31.

407. 1 Karlowa, *Römische Rechtsgeschichte* (1885) 825-828.

408. Esmein, *Cours élémentaire d'histoire du droit français* (15 ed. 335.

409. 1 Blackstone, *Commentaries on the Laws of England* (1765) 241.

410. *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, 154-155.

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and returning from the same.”⁴¹¹ Also they are privileged as to what is said in any speech or debate in any house.⁴¹² In England, a member of Parliament is privileged from arrest during the continuance of the session and for forty days before its commencement and forty days after its conclusion. But the privilege has never extended to cases of treason, felony, or breach of the peace. Moreover, it is not now claimable in case of any indictable offence nor in case of contempt of court.⁴¹³ At common law arrest upon mesne process was the ordinary way of beginning a civil action. Thus the privilege was in effect one against suit, and it extended formerly to the member’s servant. But in 1769 a statute permitted any action or suit to be commenced or prosecuted at any time against members and their servants and provided that no process was to be stayed by reason of privilege. Only the persons of members were to be privileged from arrest and imprisonment.⁴¹⁴ There is full privilege as to what is said in speeches or during debate.⁴¹⁵ Most of the state constitutions in the United States extend the privilege from arrest to privilege from service of all civil process during the session and while coming from and returning to their homes.⁴¹⁶ They also have the same provision as to speech and debate as in the federal constitution.⁴¹⁷ Privilege against arrest and privilege as to speech and debate during a legislative session are provided for in almost all modern constitutions.⁴¹⁸

411. Art. I, § 6.

412. *Ibid.*

413. Anson, *Law and Custom of the Constitution* (5 ed. 1922) 163-164.

414. 10 Geo. 3, chap. 10.

415. Anson, *op. cit.* 170.

416. Mechem, *Law of Public Offices and Officers* (1890) § 648.

417. *Ibid.* § 649.

418. 1 Dodd, *Modern Constitutions* (1909) 14, 45, 132, 154, 155, 189, 205, 220, 224, 273, 275, 293, 294, 334; 2 *id.* 11, 29, 53, 134, 151, 209, 250, 251.

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High executive and administrative officials are not privileged against suits upon causes of action arising from what they do in their private capacity, but are not to be held for what they do in exercise of powers or performance of duties confided by law to their official judgment and discretion.⁴¹⁹ They are, however, privileged as to defamatory statements in the course of performance of their duties and in proceedings before them.⁴²⁰ Judges also are not subject to be sued for damages by one claiming to be injured by action within their jurisdiction,⁴²¹ and defamatory statements made by them in the exercise of their functions in proceedings before them.⁴²²

In all this the reason clearly is the public interest in the functioning of political institutions or, ultimately, the social interest in political institutions weighed with the social interest in the individual life.

It should be said, however, that Roman law gave an action against a *iudex* who from carelessness or unfairness gave a wrong decision or exceeded the limits of the case referred to him by the praetor's formula,⁴²³ and in countries which received the Roman law judges are made liable for denial of justice⁴²⁴ or for breach of duty in connection with their jurisdiction in guardianship.⁴²⁵ Here the social interest in the individual life

419. Mechem, *Law of Public Offices and Officers* (1890) §§ 607-609; *Sullivan v. Spencer*, Ir.R. 6 C.L. 172 (1873).

420. "The class of absolutely privileged communications is narrow and practically limited to legislative and judicial proceedings and to acts of state." Hall, C. J., in *Hassett v. Carroll*, 85 Conn. 23, 35, 81 A. 1013, 1019 (1911).

421. Mechem, *op. cit.* § 619.

422. *Rex v. Skinner*, Lofft, 55 (1772); *Scott v. Stansfield*, L.R. 3 Ex. 220 (1868).

423. Inst. 4, 5, pr.; *Gaius*, 4, 52; *Dig.* 44, 7, 5, 4; 50, 13, 6.

424. French Civil Code, art. 4.

425. German Civil Code, §§ 1674, 1675, 1848.

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is given the greater weight but perhaps the Roman tradition was decisive.

Diplomatic privilege is founded on international law received as part of the municipal law of each state.⁴²⁶ The person of the diplomatic person (ambassador, envoy, minister, chargé d'affaires) is inviolable.⁴²⁷ He is not subject to the criminal jurisdiction of the country to which he is accredited.⁴²⁸ Also he is exempt from civil process in that country,⁴²⁹ and a diplomat accredited to a foreign country while temporarily in another is exempt from arrest on civil process, but may be sued in a civil action.⁴³⁰ Members of the personal and official household of the diplomatic person have the same privileges.⁴³¹ A further diplomatic privilege formerly was the "right of asylum"—a right of affording refuge to offenders against the law of the state to which the diplomatic person was accredited. But today it is considered that there is no obligation to accord such privilege. Criminals taking refuge in the embassy may be received but they must be surrendered to the prosecuting government at its request.⁴³² The basis of diplomatic privilege is the need of independence of the jurisdiction and control of the state to which diplomats are accredited in order that their duties be fully and effectively performed. On the other hand, consuls, as commercial agents, have no such privileges. They are amenable to

426. *Schooner Exchange v. McFaddon*, 7 Cranch (U.S.) 116, 3 L.Ed. 287 (1812).

427. *U. S. v. Benner*, Fed.Cas.No.14568, Baldwin, 234 (1830).

428. Vattel, *Le droit des gens* (1758) iv, 7, §§ 94-95.

429. *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94, 113 (1859).

430. *Carbone v. Carbone*, 123 Misc. (N.Y.) 656, 206 N.Y.S. 40 (1924).

431. *Carbone v. Carbone*, *supra*; *U. S. v. Benner*, *supra*; *Respublica v. De-Longchamps*, 1 Dall. (U.S.) 111, 1 L.Ed. 59 (1784); *Herman v. Apetz*, 130 Misc. (N.Y.) 618, 224 N.Y.S. 389 (1927).

432. 1 Oppenheim, *International Law* (7 ed. by Lauterpacht, 1948) § 390.

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criminal and civil process of the country where they are stationed.⁴³³ Under provision of the Constitution of the United States,⁴³⁴ however, granting jurisdiction over consuls to the federal courts, the federal judicial code exempted them from suits and proceedings in state courts.⁴³⁵ But this has been repealed.

(g) *Conditions of capacity or incapacity responding to the social interest in the security of social institutions.*

(i) *Caste.*⁴³⁶ If we think of social interests as claims, demands or desires asserted in title of social life in civilized society, it is manifest that a social interest in the security of social institutions may be strongly asserted in terms of one organization of society, which may be feebly asserted or not at all in another. In an individualist organization of society, caste as a social institution is incompatible with the social order. But we are told that the Hindu does not feel caste as a burden as men would in the individualist occidental world. To the Hindu it is felt natural and desirable. The attendant disabilities respond to a social interest in what is felt to be a fundamental social institution.⁴³⁷ Something approaching a caste system may be seen in Greece, e. g., in the division of the population of Sparta into citizens, perioeci, and helots,⁴³⁸ and at Rome in the distinction

433. Oppenheim, op. cit. § 435.

434. Constitution, art. III, § 2.

435. 28 U.S.C.A. § 271.

436. Bouglé, *Essais sur le régime des castes* (1908); Sénart, *Les castes dans l'Inde* (2 ed. 1927; transl. by Ross, *The Castes in India*, 1930); Bhat-tacharya, *Hindu Castes and Sects* (1896); Ibbetson, *Panjab Castes* (1916); Nesfield, *Brief View of the Caste System of the North-West Provinces and Oudh* (1885).

437. As to these in the old books of Hindu law see Manu, x, 40-56, Bühler, *The Laws of Manu*, 25 *Sacred Books of the East* (1886) 411-415.

438. 4 Daremberg et Saglio, *Dictionnaire des antiquités grecques et romaines* (1918) 393-396; 3 id. (1899) 67-71.

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between patricians and plebeians.⁴³⁹ Also in medieval Europe there was what has been called a quasi-caste system with rank and privileges and with control of industry by occupational guilds. It will be convenient to consider by itself rank and its attendant disabilities.

(ii) *Rank*. What we must consider here for the purposes of the law is the rank of noble and the privileges attaching to it in medieval and modern law.

In France, the feudal nobility had been intimately associated with possession of fiefs and of knighthood. Its privileges were connected with the services which it rendered. The nobility had been the military force and the prop of society. A commoner given a fief and being knighted by his lord could become a noble. In time, this changed. Knighthood in the old sense disappeared. The military service attached to fiefs lost its importance and in law all connection between nobility and the feudal system disappeared. One could be noble without holding a fief and hold a fief without being a noble. Nobility became a purely personal quality, and the privileges attached to it were no longer justified by a recognized public service. To be enobled came to require an act of sovereignty. After the fourteenth century the King conferred nobility by letters. The nobles had privileges of three types. (1) They had political and administrative privileges. Of this type were exemption from most taxes and imposts and exclusive access to certain forms of public employment. Thus by a regulation of 1781 in order to aspire to a military office one was required to show that he had inherited a nobility of four generations. (2) In criminal law and procedure certain penalties were never imposed upon nobles, such as the lash, the halter, and the gallows. They easily obtained letters of pardon. When prosecuted they were heard before a Parlement

439. Jolowicz, *Historical Introduction to Roman Law* (1939) 2, 8-16.

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(provincial high court) and were judged by the whole chamber, not by the criminal chamber of the court. They were not brought before the King's provosts but appeared in the first instance before his bailiffs and seneschals. As to the civil side of the law, in some of the *coûtumes* succession, particularly as to primogeniture, was differently regulated as to nobles and as to commoners. Also the wardship of nobles (*garde noble*) gave a surviving parent certain rights of enjoying the property of a minor. In general this was only recognized by the *coûtumes* to the profit of noble ascendants.⁴⁴⁰ All this was abolished in 1789.⁴⁴¹

Although in general the German law under the civil code had thoroughly simplified and rationalized the law as to status, there remained down to 1919 one privileged status, namely, that of the high nobility. At the beginning of the nineteenth century, the German states, in the wake of the ideas of the French Revolution, practically did away with rank as a status except that the Bavarian Nobility Edict of 1818 allowed family trust-entails (*fidei commissa*) to the nobles. Also the houses which had been estates of the German-Roman Empire, down to the revolution of 1918 were allowed a status for preservation of the *splendor familiae*. This involved a certain autonomy as to succession, membership in the family, equality of birth, marriage beneath one's status, dowry of women, guardianship and family trust-entails.⁴⁴² The Introductory Act of the Civil Code (1896) preserved the autonomy of the reigning princely houses⁴⁴³

440. Esmein, *Cours élémentaire d'histoire du droit français* (15 ed. 1925) 650-653.

441. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 408.

442. Huebner, *History of Germanic Private Law* (transl. by Philbrick, 1918) 88-108.

443. Art. 57. See Wang, *The German Civil Code, Translated and Annotated* (1907) 550.

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and provided that, to the extent allowed by state legislation, the autonomy with respect to family relations and property of the families formerly ruling members of the empire or which had obtained the legal status of such houses by resolution of the German Confederation or provisions of state laws, should remain unaffected.⁴⁴⁴ All this was abolished by the Constitution of 1919.⁴⁴⁵

In Great Britain the most important privilege of a peer is to sit and vote in Parliament. But this is not conferred by a peerage for life.⁴⁴⁶ Peers of England, Scotland, Great Britain, and the United Kingdom cannot vote at elections of members of the House of Commons,⁴⁴⁷ but peers of Ireland not chosen as representative peers may be elected to membership in the House of Commons of the Parliament of Great Britain,⁴⁴⁸ and if sitting as a member may vote at elections of members of that house.⁴⁴⁹ A peer of Scotland cannot merely as such sit and vote in Parliament, but with that exception has all the privileges of a peer of England.⁴⁵⁰ A peer is free at all times from arrest in civil cases⁴⁵¹ and from service of process for contempt of court.⁴⁵² Also if indicted for treason or felony he must be tried by the peers and cannot waive this privilege because it is not personal

444. Art. 58. See Wang, *op. cit.* 550.

445. Art. 119. See Fisk, *Germany's Constitutions of 1871 and 1919* (1924) 171.

446. *Wensleydale Peerage Case*, 5 H.L.Cas. 958 (1856).

447. *Earl Beauchamp v. Madresfield*, L.R. 8 P.C. 245 (1872).

448. 39 & 40 Geo. 3, chap. 67, art. 4 (1800).

449. 1 Anson, *Law and Custom of the Constitution* (5 ed. 1922) 130.

450. 6 Anne, c. 11, § 1, art. 23 (1706).

451. *Countess of Shrewsbury's Case*, 12 Co. 94 (1612).

452. *Pheasant v. Pheasant*, 2 Vent. 340, n. (1670).

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but is a privilege of his order.⁴⁵³ But in prosecution for a misdemeanor a peer is tried by jury the same as a commoner.⁴⁵⁴

(iii) *Entrance into a religious order.* In Austria, members of religious orders who had taken a vow of poverty were incapable of acquiring property of any kind.⁴⁵⁵ Likewise the *Sachsenspiegel* tells us that one who became a monk lost *Landrecht* and *Lehnrecht* and had no capacity of succession.⁴⁵⁶ Spiritual persons were disabled to use weapons and had no capacity of succession to property.⁴⁵⁷ At common law one who "entered into religion," i. e. a religious order, became civilly dead.⁴⁵⁸

(iv) *Profession.* A profession is a body of men pursuing a common calling as a learned art and as a public service⁴⁵⁹—no less a public service if it is at the same time an individual means of livelihood. It is, therefore, an important social institution. Security of the institution demands that its efficient functioning be maintained. Hence where general rules of law carried out fully would interfere with this the social interest is secured by privileges. In the seventeenth century and even

453. *R. v. Lord Audley*, 3 State Tr. 401 (1632); *R. v. Lord Daares*, Kel. 56 (1535).

454. *R. v. Lord Vaux*, 1 Bulstr. 197 (1612).

455. 1 Stubenrauch, *Commentar zum allgemeinen bürgerlichen Gesetzbuche*, 430 and n. 2 (1902).

456. *Sachsenspiegel*, I, art. 25, Homeyer, *Sachsenspiegel* (3 ed. 1861) pt. 1, 184-185.

457. 2 Heusler, *Institutionen des deutschen Privatrechts* (1886) 613.

458. *Co.Lit.* 93b (1628); *Archbishop of Canterbury's Case*, 2 *Co.Rep.* 48b (1596).

459. Carr-Saunders and Wilson, *The Professions* (1933); Carr-Saunders, *The Professions, Their Organisation and Place in Society* (1928); Feuchtwanger, *Der Staat und die freien Berufe, Staatsamt oder Sozialamt* (1929); Bruno, *Die Stellung der freien Berufe im Wirtschaftsleben* (1930).

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later the obligations of honor among gentlemen were considered to justify an attorney in declining to testify to a confidential communication to him by a client. This was held a personal privilege of the attorney which he waived if his conscience would allow and he was willing to risk his reputation.⁴⁶⁰ In the latter part of the eighteenth century the courts gave up this idea. The modern theory of the privilege is that the law forbids disclosure of confidential communications without the client's consent in order to promote freedom of consultation of legal advisers by precluding fear that the advisers may be compelled to disclose what is confided to them.⁴⁶¹ Accordingly, the principle upon which communications should be privileged have been said to be: (1) That they must originate in confidence that they will not be disclosed, (2) that this confidence is necessary to a full and satisfactory maintenance of the relation in which the communication was made, (3) that the relation is one which the morality of the time and place holds should be fostered, and (4) that disclosure would do more injury to the relation than benefit to the administration of justice would result from it.⁴⁶² Under this principle it is settled that in the case of attorney and client only the client can waive the privilege, since it belongs to him, not to the attorney.⁴⁶³ In New York, in 1828, legislation created a like privilege in case of physician and patient, which did not exist at common law but is now established by statute in about half of the states.⁴⁶⁴ The reasons given are much the same as those given for the privilege as between attorney and client, but

460. *Winchester v. Fournier*, 2 Ves.Sr. 445, 447 (1752).

461. *Anderson v. Bank of British Columbia*, 2 Ch.D. 644, 649 (1876); *Hatton v. Robinson*, 14 Pick. 416, 424 (1838); *Wade v. Ridley*, 87 Me. 865 (1895).

462. 8 Wigmore, *Treatise on the Anglo-American System of Evidence* (10 ed 1940) § 2285, p. 531.

463. *Ibid.* § 2327.

464. Rep. of Committee on Improvements in the Law of Evidence (1938) 63 Rep.Am.Bar Ass'n 570, 590.

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chiefly the privilege seems to have been based on a doubtful analogy and the policy of such legislation has been questioned.⁴⁶⁵ In a few states there has been legislation extending the privilege to journalists, accountants, detectives, confidential clerks and stenographers, trust companies, and officials learning of an illegitimate birth, and it has been claimed for social workers.⁴⁶⁶ These are privileges belonging not to the person making the communication but to the one to whom it is made. They do not meet the principle on which privileges in professional relations are founded and have deservedly been severely criticised.⁴⁶⁷ At common law confessions to priests are not privileged.⁴⁶⁸ But in more than half of the states of the United States and in Quebec and Newfoundland such confessions, made in pursuance of a church discipline which gives rise to a relation of priest and penitent, are privileged by statute.⁴⁶⁹ This privilege is on firmer ground of principle than those which go chiefly on the claim of different callings to be put on a plane of the older professions and to have the privilege granted to them as a matter affecting their dignity. The privilege as between attorney and client and between physician and patient do not rest on the dignity of the calling but on a weighing of the effectiveness of the professions as social institutions with the effective administration of justice.

In France, the penal code provides for prosecution of any person who by virtue of his profession is a depository of secrets confided to him and reveals such secrets.⁴⁷⁰ The French advocate

465. Ibid. See also Wigmore, *op. cit.* § 2380*a*.

466. Wigmore, *op. cit.* § 2286.

467. Rep. of Committee on Improvements in the Law of Evidence (1938) 63 Rep.Am.Bar Ass'n 570, 595; Wigmore, *op. cit.* § 2286.

468. Wigmore, *op. cit.* § 2394.

469. Ibid. § 2395.

470. Appleton, *Traité de la profession de l'avocat* (1928) no. 20.

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cannot be released by his client from his obligation of secrecy lest the client's consent might be forced by fear of the suspicion which would attach to his refusal to consent. Nor can the advocate be compelled to testify as a witness to what has been communicated to him confidentially.⁴⁷¹ Likewise, the office of the advocate is immune from searches and seizures to reach confidential papers and documents confided to him unless the advocate is a co-offender with or accomplice of his client.⁴⁷²

In England, defamatory statements by counsel in the trial of a case are absolutely privileged.⁴⁷³ In America, they are privileged only with respect to matters connected with the case. If counsel goes afield to defame maliciously he is held to exceed his privilege.⁴⁷⁴ Here the social interest in effective performance of a public service is weighed with the individual interest in reputation subsumed under the social interest in the individual life.

In the United States it is usual to exempt at least active members of professions from jury service. For example, Massachusetts exempts attorneys at law, "settled ministers of the gospel," registered practising physicians and surgeons, and teachers.⁴⁷⁵ The reason is that such service, taking them away from their regular work for a considerable time, is an interference with the more important public service which their professions render

(*v*) *Incapacities based on security of race institutions.* Many different reasons have in different times and places led

471. Ibid. no. 202.

472. Ibid. no. 201.

473. *Munster v. Lamb*, 11 Q.B.D. 588 (1883).

474. *Maulsby v. Reifsnider*, 69 Md. 143, 162, 14 A. 505, 510 (1888); *La Porta v. Leonard*, 88 N.J.L. 663, 97 A. 251, L.R.A.1916E, 779 (1916).

475. 2 Mass.Gen.Laws (Tercentenary ed. 1932) chap. 231, § 1.

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to imposition of disabilities or incapacities because of race or color. In case of free negroes in the Southern states of the United States before the Civil War, the general security was the primary basis.⁴⁷⁶ In the case of the American Indians, who, except for certain Indians whose relations with some states were established before the federal constitution, are wards of the federal government,⁴⁷⁷ the need of protection against rapacious exploiters of people recently made into individual owners of property in a competitive social organization no doubt has called for some kind of guardianship. But the reality of this guardianship has often been too like the guardianship of the paramount lord over infant heirs in medieval English law.⁴⁷⁸ In the case of the immigration laws against the Chinese in the United States and Australia,⁴⁷⁹ and the legislation forbidding naturalization of Mongolians⁴⁸⁰ the primary reason was economic—to secure the white laborer against the competition of persons whose different standards of living made against maintenance of the established local standard life. Legislation against miscegenation has chiefly rested on a demand for maintaining purity of race as a social institution.⁴⁸¹ This is no longer generally felt as a significant social interest.⁴⁸² Segregation of Jews or of negroes,

476. See Aptheker, *American Negro Slave Revolts* (1943) *passim*, e. g. pp. 75-78.

477. *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). As to admission of Indians to citizenship, see Van Dyne, *Treatise on the Naturalization Laws of the United States* (1907) 316-317.

478. Thayer, *A People Without Law*, *Legal Essays* (1908) 91-140.

479. Act of May 6, 1882, as amended in 1884, 22 St.L. 59, 23 *id.* 115; Act of September 1, 1888, 25 St.L. 476; Act of April 28, 1902, re-enacted by Act of April 25, 1904, 33 St.L. 394-428; Australia, *Commonwealth Immigration Restriction Act*, 1901, § 3a.

480. Act of May 6, 1882, 22 Stat., chap. 126, § 14; *Fong Yue Ting v. United States*, 149 U.S. 698, 716, 13 S.Ct. 1016, 1023, 37 L.Ed. 905 (1893).

481. Stephenson, *Race Distinctions in American Law* (1910) chap. 6.

482. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948).

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recently by the device of restrictions against their living in certain neighborhoods, involves a similar claim of the numerically prevailing race to have only themselves for neighbors. This is not held usually today to be a reasonable demand calling for securing as against the social interest in individual physical, cultural and social opportunities.⁴⁸³

(vi) *Illegitimacy*. Disabilities have been imposed upon illegitimate children to maintain the social interest in marriage as a social institution. In a kin-organized society they were not on an equality with the normal legal person.⁴⁸⁴ Commonly their capacity for inheritance is limited.⁴⁸⁵ This is becoming altered to some extent by recent legislation.⁴⁸⁶

(vii) *Celibacy* involved incapacity under Roman legislation of the early empire. A *coelebs* was an unmarried man of over twenty-five or an unmarried woman of over twenty. Such a person could take nothing either by inheritance or legacy unless married within one hundred days after the right accrued.^{486a}

483. Restrictive covenants that land shall not be leased or conveyed to any negro: *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441 (1948); *Hurd v. Hodge*, 334 U.S. 24, 68 S.Ct. 847, 334 U.S. 24, 92 L.Ed. 1187 (1948).

484. Greek law: Hermann, *Lehrbuch der griechischen Rechtsaltertümer* (4 ed. 1895) 118, n. 2; Germanic law: *Sachsenspiegel*, I, art. 38, § 1; Homeyer, *Sachsenspiegel* (3 ed. 1861) pt. 1, 193; Hübner, *History of Germanic Private Law* (transl. by Philbrick, 1918) 104-105.

485. In Roman law the illegitimate child was a cognate of the mother, took the mother's status, and the child could inherit from her and she from the child. *Inst.* 3, 5, 4; *Inst.* 3, 4, 3; *Dig.* 38, 17, 2, 1; *Paul Sent.* iv, 10, 1. See also *Darrrough v. Davis*, 135 Okl. 263, 275 P. 309 (1928).

486. Indiana, Acts of 1901, 228; Laws of North Dakota, 1917, chap. 70; Castberg, *Children's Rights Laws and Maternity Insurance in Norway* (1916) 16, pt. 2, *Journ.Soc. Comparative Legislation*, N.S., 283, 285-290; Robbins, *Familial Rights of Illegitimate Children* (1930) 30 *Columbia Law Rev.* 308; Hübner, *History of Germanic Private Law* (transl. by Philbrick, 1918) 673-674.

486a. *Galus*, 3, 111; *Ulpian*, *Rules xvii*, 1.

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But the rule did not apply to men of over sixty or women of over fifty if they had been married when they reached that age.^{486b} Childless married persons (*orbi*), unless soldiers, could only take half of an inheritance or legacy.^{486c} These rules disappeared after the empire became Christian and are not found in the codification under Justinian.^{486d}

(h) *Conditions of capacity and incapacity responding to the social interest in the security of religious institutions.* In the Middle Ages, Christendom was thought of as at once a universal church and a universal empire. Existence as a legal unit presupposed membership in the Catholic church no less than membership in the state. One who stood outside the religious organization of society could not be a member of politically organized society and so entitled to the protection of law. In the medieval Christian theory of the world heretics, heathen, and Jews were not legal persons. From the last quarter of the fourth century and especially during and after the fifth century, the later Roman empire imposed disabilities as well as penalties on heretics,⁴⁸⁷ apostates,⁴⁸⁸ and Jews.⁴⁸⁹ For example, Manichaeans and Donatists could not acquire by any form of gift or succession. They could not give, buy, sell, or make any contracts. The children of heretics could not inherit unless they gave up the heresies of their fathers and repented. Their escaped slave became free upon entering the Catholic church.⁴⁹⁰ Apostates could not make a will nor succeed to property nor take

486b. Ulpian, Rules, xvii, 3.

486c. Gaius, 3, 111.

486d. Buckland, Text-Book of Roman Law (2 ed. 1932) 293.

487. Cod. 1, 5.

488. Cod. 1, 7.

489. Cod. 1, 9.

490. Cod. 1, 5, 4 (A.D. 426).

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by will, could not dispose of their property, and could not testify as witnesses. Their property passed as on intestacy to their next of kin who were of orthodox faith.⁴⁹¹ There could be no marriage between Christian and Jew, and the Jews could not hold public office nor dignities.⁴⁹² But they were protected from having the prices at which they should sell fixed by any one but their own chief men.⁴⁹³ Also they could resort to their own tribunals as arbitrators for civil causes among themselves, although the award could not be enforced by the Roman courts, or they could go before the Roman courts and be judged by Roman law.⁴⁹⁴ As the Jews were not heathen, they believed in the same God as the Christians, nor heretics who had fallen away from the orthodox faith, but instead had not adopted it, they were protected in their persons and property.⁴⁹⁵ The Germanic states which arose in the territory of the Western Empire followed the lines of this legislation and the medieval church built on it, protecting the Jews in life, property, and religious custom, but zealously guarding against spread or influence of Judaism. The canon law as to the Jews was taken over in France and England as part of the general law. It forbade marriage between Christians and Jews, excluded Jews from public office, forbade their employing Christian servants or being witnesses against Christians, and forbade Christians letting them property or leasing houses to them.⁴⁹⁶

491. Cod. 1, 7, 4 (A.D. 426).

492. Cod. 1, 9, 5 (A.D. 388); 1, 9, 18 (A.D. 439). See also Nov. 45 (A.D. 537).

493. Cod. 1, 9, 8 (A.D. 396).

494. Ibid.

495. Cod. 1, 9, 14 (A.D. 412).

496. Esmeln, *Cours élémentaire d'histoire du droit français* (15 ed. 1925) 647-649; 1 Pollock and Maitland, *History of English Law* (2 ed. 1898) 468-475.

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On the other hand, the Germanic law, thinking in terms of a kin-organized society rather than of the Roman law, and so of the law of the folk and of the customs of an alien race, treated the Jews as having no capacity for rights, as in case of slaves. They were said to be in quasi-public servitude. Indeed this proposition found itself in the canon law and the Summa of Thomas Aquinas.⁴⁹⁷ For economic reasons rulers began to take particular individuals under their special protection. In the thirteenth century all Jews in Germany were given the privilege of protection of life, property, power to dispose of their property, and capacity of testifying as witnesses. Thus they were held royal serfs bound in return for the charter of their liberties, to pay taxes to the royal exchequer. They were called *cameral* or *exchequer serfs*. Heavy tributes were exacted from them by Kings and territorial rulers. Except for this protection they had no capacity for rights.⁴⁹⁸

Legislation of the French Revolution (1791) put Jews on an equality with all other citizens.⁴⁹⁹ Prussia in 1812 and some other German states followed this example, and in 1869 the Confederation extended it to all of Germany.⁵⁰⁰

Heretics in the Middle Ages were much worse off than Jews. They were held criminals of the first order, not merely subjected to disabilities.⁵⁰¹ In France, at the Reformation, the

497. Decretals of Gregory IX, v, 6, 13 (1205); Summa Theologica, II-II, qu. 10, art. 12—*Judaei sunt servi principum servitate civili*.

498. For full discussion see Stobbe, *Die Juden in Deutschland während des Mittelalters* (1866); Hübner, *History of Germanic Private Law* (transl. by Philbrick, 1918) 83-87.

499. They had already been freed from burdensome tolls by an edict of 1784. Esmein, *Cours élémentaire d'histoire de droit français* (15 ed. 1925) 649.

500. Hübner, *op. cit.* 86-87.

501. *Ibid.* 79-83; 2 Pollock and Maitland, *History of English Law* (2 ed. 1898) 544-552.

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traditional rules as to heresy were applied to Protestants. We are not concerned here with the penal provisions of the series of ordinances and edicts against Protestants between 1525 and 1559. The Edict of Nantes (1598) put an end to persecution and gave the reformed religion a partial liberty. It gave Protestant establishments the same right to acquire and hold property as that possessed by the Catholic church and gave Protestant ministers the same exemption from poll taxes and other personal charges as the Catholic clergy. Also it gave the Protestants full civil capacity. They could hold offices and dignities and exercise seigniorial rights. Their children could be admitted to Universities, colleges, and schools, they could be admitted to hospitals, and marriages before their ministers were made valid. But the Edict of Nantes was revoked in 1685. There followed a presumption of law that all Protestants who had not left the country had become Catholics. Hence any Protestants who manifested their belief could be prosecuted as relapsed heretics or apostates. They could not contract valid marriages and their children were illegitimate. In 1787, by an edict of Louis XVI, the Protestants were restored to a part of their former rights.⁵⁰² After the French Revolution the Civil Code provided that every Frenchman should enjoy civil rights.⁵⁰³

In the domain of the German Roman Empire the Protestant Reformers no less than the Catholics held persistently to the doctrine that state and church were an indissoluble unity so that all subjects of the state must be members of the state church. After the Peace of Augsburg (1555) Protestants were regarded as a tolerated sect. But one exclusive church was recognized, namely, the church to which the territorial ruler adhered, whether Catholic or Evangelical. Membership in the

502. Esmein, *Cours élémentaire d'histoire du droit français* (15 ed. 1925) 641-647.

503. French Civil Code, art. 8.

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territorial church was a prerequisite of legal personality. The Peace of Westphalia (1648) recognized a complete equality of the Catholic and the Evangelical states of the empire. But this did not mean an equality of individuals of the respective faiths in a particular territory. Nor was there complete freedom of adherence to religious denominations. There must be membership in one of the two Christian faiths which were recognized. Moreover, each territorial ruler could declare the religion of his domain. The rule was *cuius regio eius religio*. Those who did not adhere to the ruler's religion could be required to emigrate, although their property was preserved to them. Also the rights of Protestants in Catholic states and Catholics in Protestant states, who had freedom of religion in 1624, were preserved except in Austria. Prussia in an edict of 1788 and later in the Civil Code in 1794⁵⁰⁴ abolished all differences of legal status as between adherents of different denominations of Christians. The Austrian Civil Code of 1811⁵⁰⁵ went the whole way and declared that religious differences should not affect civil rights. At length after gradual extensions in different states, the Confederation in 1869 abolished all limitations upon civil or political rights based upon differences of religious faith.⁵⁰⁶

England also continued to maintain a state church after the Reformation and when Blackstone wrote in 1769 non-conformity to the established church was described as a crime.⁵⁰⁷ He named three kinds of offenders: Those who "through total irreligion" absent themselves from church, Roman Catholics

504. Allgemeines Landrecht für die Preussischen Staaten (1794) Theil I, tit. 11, §§ 1-12.

505. Allgemeine bürgerliche Gesetzbuch (1811) § 39.

506. Hübner, History of Germanic Private Law (transl. by Philbrick, 1918) 82-83.

507. 4 Blackstone, Commentaries on the Laws of England (1769) 51-59.

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(described in the statutes as Papists) and Protestant Dissenters. Sixteenth and seventeenth-century legislation was exceptionally severe on Catholics and little less so on Protestant Dissenters.⁵⁰⁸ It was much mitigated as to Protestant Dissenters by the Toleration Act⁵⁰⁹ and later by a statute of George III.⁵¹⁰ While what Blackstone called "the crime of non-conformity" was by no means wholly abrogated, it was suspended as to Christians and Protestants who approved themselves "no Papists or oppugners of the Trinity."⁵¹¹ Also all officers, civil and military, had as well to make a declaration against transubstantiation. As to Catholics, when Blackstone wrote they could not take lands either by descent or purchase after eighteen years of age unless they "renounced their errors." At the age of twenty-one they were required to register estates before acquired and all future conveyances and wills, and could not "keep or teach a school." Popish recusants (i. e. Catholics who persistently separated from the national church) could not sit in Parliament nor keep arms in their house, nor keep any horse above the value of five pounds. By a statute of George III⁵¹² these restrictions were abrogated as to Catholics taking an oath of allegiance, renunciation of the civil power of the Pope, and abhorrence of the doctrines of not keeping faith with heretics and deposing or murdering princes excommunicated by the see of Rome. Jews,⁵¹³

508. 23 Eliz. cap. 1 (1581); 29 Eliz. cap. 6 (1587); 35 Eliz. cap. 1 (1593); 3 Jac. 1, cap. 5 (1605); 22 Car. 2, c. 1 (1670).

509. 1 Wm. & M.St. 1, c. 18 (1688).

510. 19 Geo. 3, cap. 44 (1779).

511. Thus excluding Catholics and Unitarians. 9 Geo. 4, cap. 17 (1828). As to disabilities of dissenters, see Beldam, *Laws Affecting Protestant Dissenters* (1827).

512. 31 Geo. 3, cap. 32 (1791).

513. Jews' Relief Act, 21 & 22 Vict. cap. 49 (1858), 23 & 24 Vict. cap. 63 (1860); Parliamentary Oaths Act, 29 Vict. cap. 19 (1866).

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Quakers,⁵¹⁴ and Atheists⁵¹⁵ were still subjected to disabilities by the form of oath required of them until well after the middle of the nineteenth century. The Catholics, having no difficulties about the oaths, were first relieved.⁵¹⁶ Atheists were not wholly relieved till 1888.⁵¹⁷

(i) *Conditions of incapacity responding to the social interest in the general security.* In an early stage of social and legal development the impious person who has offended the gods is a threat to the general security in that the society which harbors him is liable to incur their wrath. The general security requires that he be got rid of speedily, either by way of sacrifice to the gods or to an offended god, or by the hand of the firstcomer. Hence there come to be various modes of extinguishing legal personality, which may disappear or may be taken over and reshaped by politically organized society, or may leave remnants in the way of impairments of legal personality and conditions of incapacity. Here we may put *sacratio* in the beginnings of Roman law,⁵¹⁸ outlawry in Germanic law as well as in the common law,⁵¹⁹ convic-

514. Promissory Oaths Act, 31 & 32 Vict. cap. 72, § 11 (1868). As to disabilities of Quakers, see Davis, *Enactments Relating to Quakers* (2 ed. 1849).

515. *Clarke v. Bradlaugh*, 7 Q.B.D. 38, [1881] 8 App.Cas. 354, [1883]; *Bradlaugh v. Gossett*, 12 Q.B.D. 271, [1884]; *Attorney General v. Bradlaugh*, 14 Q.B.D. 667, [1885].

516. Roman Catholic Relief Act, 10 Geo. 4, cap. 7 (1829).

517. Oaths Act, 51 & 52 Vict. cap. 46 (1888).

518. 3 Clark, *History of Roman Private Law, Regal Period* (1919) 582-584.

519. Heusler, *Institutionen des deutschen Privatrechts* (1885) § 43; 2 Pollock and Maitland, *History of English Law* (2 ed. 1898) 449-450; Richards, *Is Outlawry Obsolete?* (1902) 18 L.Q.Rev. 257.

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tion of felony and corruption of blood in the common law,⁵²⁰ and two of the three forms of "civil death" at common law.⁵²¹ These are more conveniently looked at later in connection with termination of legal personality.⁵²² But incapacity to inherit where the heir has killed or forcibly dispossessed or robbed the ancestor⁵²³ has a counterpart in modern law.⁵²⁴ Also we should note leprosy, which excluded capacity to inherit in Hindu law and in medieval Europe,⁵²⁵ as we are told "because of superstitious dread," i.e. to maintain the general security.⁵²⁶

(j) *Conditions of incapacity responding to the social interest in the general morals.* In a society in which law in the lawyer's sense has yet to develop, there may be a settled public opinion, as it might be put, as to the respectability of certain conditions, qualities, callings, and modes of life which are taken to preclude as to

520. 1 Blackstone, *Commentaries on the Laws of England* (1765) 132.

521. 2 *id.* (1766) 251-256.

522. *Post*, § 127.

523. Jolly, *History of the Hindu Law of Partition, Inheritance, and Adoption* (1885) 382; 1 Heusler, *Institutionen des deutschen Privatrechts* (1885) 196; *Sachsenspiegel* I, art. 65, § 2, Homeyer, *Sachsenspiegel* (3 ed. 1861) pt. 1, 222; Goerlitzer *Landrecht*, cap. 41, § 1, cap. 47, § 15, II, 2 Homeyer, *Sachsenspiegel* (1844) 223.

524. French Civil Code, art. 727; *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340 (1889); *Whitney v. Lott*, 134 N.J.Eq. 586, 589-592, 36 A.2d 888 (1944); *Garner v. Phillips*, 229 N.C. 160, 47 S.E.2d 845 (1948) and cases there cited.

525. Jolly, *op. cit.* 276; 1 Pollock and Maitland, *History of English Law* (2 ed. 1898) 480.

526. Jolly, *loc. cit.*

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persons affected the respect otherwise shown to every man as a man. Such persons are regarded by society as wanting in the unblemished repute of the normal man. "Honor," the unqualified repute of the normal man gives a standard for social control. These social appraisements are taken advantage of by law and legal consequences are attached to the lessening or complete loss of social esteem. But the social and the legal concept of honor do not always coincide. Hence there may be confusion and sometimes an unsystematic body of precepts defying analysis results. At any rate, in Greek law, in Roman law, and in Germanic law, honor became a legal concept and as such came to no small extent to determine the position of the individual in private law.

In Greek law, impairment of legal personality or legal incapacity through loss of civic honor was called ἀτιμία.⁵²⁷ Andocides⁵²⁸ tells of three types of persons who were held infamous: Public debtors in default, those on whom an ignominious sentence had been imposed, and those who had been deprived of some particular legal right (broader sense), e. g. had been deprived of the power of bringing public actions for frivolous institution of one or for failure to prosecute one when brought. Those in the first category were punished and their property was confiscated. Those in the second category were deprived of political rights, e. g. they could not be candidates for public office, nor sit as dicasts. Those in the third category could not bring certain actions nor testify as witnesses. Others in the

527. Hermann, *Lehrbuch der griechischen Rechtsaltertümer* (4 ed. by Thailheim, 1895) § 3; 2 Vinogradoff, *Historical Jurisprudence* (1922) 189-190.

528. Andocides, *On the Mysteries*, 73-76.

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second category were vagrants⁵²⁹ and evil livers such as those who ill treat their parents, shirkers of military service, and practicers of certain vices.⁵³⁰

In Roman law *existimationis minutio*, impairment of civic honor, *infamia*, is an important legal conception in the law of persons.⁵³¹ *Infamia* was "a moral censure pronounced by a competent authority in the state on individual members of the community, as a result of certain actions which they had committed, or certain modes of life which they had pursued, this censure involving disqualification for certain rights both in public and in private law."⁵³² Analytically it is a point of contact of law and morals, a moral idea and institution which in its development became legal, political, and still in part moral with legal and political consequences. It has become legal already in the Twelve Tables which put in statutory form what may have been a matter of positive morality.⁵³³ *Existimatio*, civic honor, is an attribute of normal personality. It is thought of as an already existing condition. The state may interfere to diminish it or in exceptional cases to restore it. But the state does not create it. It is recognized not created.⁵³⁴ There was a difference

529. Antiphon, On the Murder of Herodes, 9 ff.

530. Aeschines, Against Timarchus, 27-38.

531. Greenidge, *Infamia in Roman Law* (1894); Buckland, *Text-Book of Roman Law* (2 ed. 1932) 91-92; 1 Karlowa, *Römische Rechtsgeschichte* (1885) 235-237; 1 Savigny, *System des heutigen römischen Rechts* (1840) §§ 76-83, transl. by Rattigan, Savigny, *Jural Relations* (1884) 165-171; I Windscheid, *Pandekten* (9 ed. 1906) § 56.

532. Greenidge, *Infamia in Roman Law* (1894) 37.

533. XII Tab. viii. 22: "Let one who was witness or balance holder [i. e. witness in a formal legal transaction] who does not testify be deemed dishonest and incapable of being witness." 1 Bruns, *Fontes Juris Romani Antiqui* (7 ed. 1909) 33.

534. "*Existimatio* is the condition of unimpaired dignity approved by laws and morals, which is diminished or consumed by the authority of laws through our fault." Callistratus (beginning of the third century) Dig. 50, 13, 5, 1.

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between impairment or loss *existimatio* and diminution of *caput* or legal personality. Loss of citizenship affected personality. On the other hand, the censor might on moral grounds suspend the *ius suffragii* (right of voting) of a citizen who would still remain a citizen with all the other rights involved in citizenship. The theory was that a moral taint involved a civic disability, and this disability, based upon a moral defect, was called *infamia*.

There were three ways in which impairment of civic honor could be brought about: (1) By action of the magistrate who presided at elections, but chiefly of the censor; (2) by action of the praetor, the magistrate who had control of procedure in the civil courts; and (3) by legislation pronouncing certain persons unworthy of civic honor. Under the first head there was notation as infamous by the censor. Under the second *infamia* was the result of condemnation in certain actions—for private delicts *furtum* (theft, conversion), *injuria* (intentional aggression upon the person), *ui bona rapta* (robbery), *dolus* (fraud), and upon obligations, *fiduciae* (pledge), *pro socio* (partnership), *tutela* (guardianship), *mandati* (mandate, gratuitous commission). Under the third head there were various disqualifications involved in condemnation in a criminal proceeding, the extent depending upon different statutes. In general, they were exclusion from holding office or certain particular offices, exclusion from the Senate, incapacity to be a *iudex*, incapacity to be a witness.⁵³⁵

What had been one of the functions of the King and later of the consuls was in 443 B.C. given to a new magistrate, the censor.⁵³⁶ His main function was registration of the citizens. This involved assignment of the pecuniary burdens which the state imposed on individuals. In addition, it involved passing

535. Greenidge, *Infamia in Roman Law* (1894) 28-29.

536. Livy, iv, 8.

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on the moral worth of the citizen as a guarantee of proper exercise of public duties. Hence the censorian *regimen morum*.⁵³⁷ This became his chief function. The process was called *notatio* from the mark (*nota*) which the censor made under the name of the person affected, to which he added a statement of the cause of the notation. The notation might be a record of a fact already proved or a statement of the censor's belief. In the latter case there was usually a judicial proceeding.⁵³⁸ Abusive exercise of power in the domestic relations, abuse of divorce, default in religious observances, default in required mourning for the dead, default in matters of honor and good faith in relations of man with man, following of base callings, and failures in political duty were grounds of notation as infamous.⁵³⁹

We know more about pretorian *infamia* from portions of the praetor's edict in commentaries upon it preserved in the Digest of Justinian. The praetor refused to allow one who was noted as *infamis* to appear as advocate for any one or to represent or be represented in litigation.⁵⁴⁰ Those who had been condemned for certain offences⁵⁴¹ could not appear for any one. In general those noted as infamous could only act for persons connected with them and could not appoint any one to act further.⁵⁴² They could not make accusations of crimes nor hold offices nor dignities,⁵⁴³ and might at the time they were noted be made incapable of being witnesses.⁵⁴⁴ Indeed, there seems to have

537. Greenidge, op. cit. 41.

538. Ibid. 52-53.

539. Ibid. 63-73.

540. Dig. 3, 1, 1, 5.

541. Dig. 3, 1, 1, 6.

542. Dig. 3, 1, 1, 8.

543. Dig. 48, 7, 1, pr.

544. Dig. 28, 1, 16.

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been a controversy whether they could take part in a legal transaction requiring witnesses.⁵⁴⁵ The perpetual edict included in the category of *infamia* following of shameful trades and callings, condemnation in or compromise of actions involving breach of good faith, fraud, malice, and theft, dishonorable dismissal from the army, and misconduct in family relations.⁵⁴⁶ *Infamia* was used by the praetor to give effect to equitable remedies. It was involved in universal execution where the whole estate of the debtor was sold to satisfy judgments against him.⁵⁴⁷

Praetorian *infamia* swallowed up censorian *infamia*. Legislation of the empire used impairment of civic honor as a mode of punishment.⁵⁴⁸

Germanic law⁵⁴⁹ from the beginning put stress upon having full honor. Tacitus tells us that one who in cowardice had thrown away his shield in battle was excluded from sacrifice and from the popular assembly.⁵⁵⁰ In the Carolingian legislation it is provided that a wrongdoer condemned to death but pardoned, could not be a witness, nor be a *schoeffe* (assessor, assistant judge), nor free himself of criminal charges by oath, but must submit to ordeal.⁵⁵¹ The medieval law goes into much detail as to different forms of honor and the legal consequences of impairment of them. This elaboration of detail of a law of honor seems to be peculiar to Germanic law.⁵⁵²

545. Dig. 28, 1, 26.

546. Dig. 3, 1, 1, 5-8.

547. Cod. 2, 11(12), 11.

548. Greenidge, *Infamia in Roman Law* (1894) chap. V.

549. Hübner, *History of Germanic Private Law* (transl. by Philbrick, 1918) 102-108; von Amira, *Grundriss des germanischen Rechts* (3 ed. 1913) § 43; 1 Heusler, *Institutionen des deutschen Rechts* (1885) 190-199; Brunner, *Grundzüge der deutschen Rechtsgeschichte* (8 ed. 1930) 193-195.

550. Tacitus, *Germania*, 6.

551. Hübner, *Grundzüge des deutschen Privatrechts* (4 ed. 1922) 104.

552. *Ibid.*

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A distinction is made between *Echtlosigkeit* (complete loss of capacity for rights), which might take place by being put outside of the peace, or what might be called social outlawry (*Friedlosigkeit*) or later through judicial outlawry (*Oberacht*). This involved incapacity of contracting a valid marriage but had nothing to do with honor.⁵⁵³ Civil death developed from it. There were two forms of limited capacity for rights where the limitations were due to defective honor. First, *Rechtlosigkeit* might be a consequence of dishonorable action. This happened when persons were found guilty of doing what made them impossible of recognition among reputable men. One type was persons condemned to a degrading punishment. Here the decisive point was the condemnation and the notoriety it involved. It made no difference that actual punishment may have been avoided by settlement or composition. Another type resulted from doing something evincing a base or depraved disposition although there had been no condemnation. The important element here is breach of faith. Here there was loss of honor and so of full capacity for rights.⁵⁵⁴ As to these two categories, comparison should be made with the Roman law where the defendant in an action of good faith or an action for malicious injury was noted as infamous even if he had compromised and so escaped condemnation.⁵⁵⁵ Second, *Rechtlosigkeit* might be due to personal relations or special callings. Here are included persons born out of wedlock and those who led a dishonorable life in following an opprobrious or ignominious calling. Such were vagrants, jugglers, conjurers, dancers, street singers, itinerant minstrels, vagabond apprentices, begging gypsies, and

553. 1 Heusler, *Institutionen des deutschen Privatrechts* (1885) 195, 196, 198.

554. *Ibid.* 195-196; Hübner, *Grundzüge des deutschen Privatrechts* (4 ed. 1922) 105.

555. See note 546 *supra*.

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knife grinders. But some of these joined in associations and guilds and so attained legal recognition. Those who followed a disreputable calling had no standing in the administration of justice. They could not be *schöffen*, judges, witnesses, or for-speakers. They were incapable of taking an oath and could only defend themselves in trial by battle. They were excluded from public offices, were not received into crafts, and were not ordained or buried in hallowed places.⁵⁵⁶ They had no wergeld (fixed money payment to the kinsmen when one was killed) and only a simulated bot (composition for a wrong done them).⁵⁵⁷

With the reception of Roman law the Roman doctrines as to *infamia* and *turpitude* were more or less fused with the ideas of the Germanic law and the conception of honor came to be held specially determinative of status. But there was little more than formal modification of the older law. In modern law, however, its influence in private law became greatly restricted. As a penal device, loss of civic honor might have consequences in private law. Persons deprived of civic honor could be excluded from associations, clubs, and trade unions and could not be editors of periodicals. But *infamia* persisted in German law so far that loss of civic honor continued to have legal consequences even without an adjudication.⁵⁵⁸ For example, in German labor law it was a recognized proposition that contracts might be dissolved for lack of honor in the other party. No one was to be held to work longer with another who had proved a bad member of society.⁵⁵⁹ Also there was, during the term of imprison-

556. Heusler, *op. cit.* 193-195.

557. Gierke explains that the old law inclined to give something at least, even if an empty form instead of simply awarding nothing. *Der Humor in deutschen Recht* (2 ed. 1886) 45. A similar idea obtains in China, where people expect what is called a reconciliation rather than an out and out decision and are not satisfied if each party does not obtain something.

558. Hübner, *Grundzüge des deutschen Privatrechts* (4 ed. 1922) 109-110.

559. 1 Hedemann, *Die Fortschritte des Zivilrechts in XIX Jahrhundert* (1910) 75.

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ment for maladministration of property, incapacity to acquire a family trust or to hold land by feudal tenure, and there were postponements in inheritance.⁵⁶⁰ All this has ceased to be of practical importance.

In the common law ⁵⁶¹ moral depravity, as shown by conviction of a crime "implying such a dereliction of moral principle as carries with it a conclusion of a total disregard to the obligation of an oath," ⁵⁶² and rendering the perpetrator infamous, was formerly held to carry with it disqualification to be a witness. But only a judgment of conviction would have that effect.⁵⁶³ The rule seems to have become established in the seventeenth century.⁵⁶⁴ This disqualification was subjected to destructive criticism by Bentham,⁵⁶⁵ and has been abolished by statute in England, and abolished or restricted to perjury or to a few crimes and disqualification only as to testifying in criminal trials in substantially all of the United States.⁵⁶⁶ The conviction may be shown to affect credibility of the witness but not to establish disqualification. Bentham's unanswerable arguments have prevailed. There was also at one time a doctrine of disqualification by turpitude taking on various forms, e. g. that "one who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession . . . untrustworthy as a witness."⁵⁶⁷ Today every form of

560. Hübner, *op. cit.* 110.

561. 2 Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940) §§ 515-531.

562. 1 Greenleaf, *Law of Evidence* (1842) § 373.

563. *Ibid.* § 375.

564. 1 Wigmore, *Evidence* (3 ed. 1940) § 519.

565. 5 Bentham, *Rationale of Judicial Evidence* (1827) 78-124.

566. 1 Wigmore, *op. cit.* § 524.

567. *Ibid.* § 525.

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this except, perhaps, that an official will not be allowed to contradict his own certificate, has been given up.⁵⁶⁸

(k) *Conditions of incapacity because of physical defects.* These incapacities, numerous in the earlier stages of legal development, do not respond to the social interest in the individual life or as to defectives, which lead us to look at the physically defective very differently today.

In primitive societies there is often what seems a superstitious prejudice against physical deficiency.⁵⁶⁹ But in such societies inability to take effective part in the necessary activities of society was a serious matter from a social not merely from the individual standpoint. At times when war was the normal condition of kin-organized societies or city states, or when and where communities have been chronically on the verge of starvation, any considerable number of physically unfit may be a burden not to be borne. Inability to perform certain ceremonial acts required by strict law or services incident to feudal tenure may also give rise to incapacities. Thus in Roman law a deaf mute could not make the formal *nuncupatio* requisite for a will nor could he take part in the formal contract by question and answer.⁵⁷⁰ A constitution of Justinian allowed one who became deaf and dumb by disease to make a will in writing.⁵⁷¹ According to the *Sachsenspiegel*, a deaf mute could not inherit under *Lehnrecht*, i. e. land held by feudal tenure, where the tenant was

568. Ibid. §§ 529, 530.

569. "To heathendom life seems nothing without health of the body and full use of all members." 1 Grimm, *Deutsche Rechtsaltertümer* (4 ed. 1922) 669.

570. Inst. 2, 12, 3.

571. Cod. 6, 22, 10 (A.D. 531).

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bound to do military service, but could under Landrecht, i. e. the law governing other than feudal relations.⁵⁷² In Hindu law the deaf mute and the blind could not inherit.⁵⁷³ This is laid down also as to the blind in the Sachsenspiegel.⁵⁷⁴ Nor could a blind man make a will in Roman law until a constitution of Justin provided for making it before a notary.⁵⁷⁵ Dwarfs and helpless cripples were excluded from inheritance by the Hindu law⁵⁷⁶ and by the Sachsenspiegel.⁵⁷⁷ Those who could not fight could not inherit. Also the Hindu law excludes eunuchs and impotent persons.⁵⁷⁸ This has been attributed to religious grounds, i. e. that they could not raise up heirs to keep up the ancestor worship, but the present tendency is to deny the religious origin of Hindu legal precepts.⁵⁷⁹ Roman law distinguished *castrati* (eunuchs) and *spadones* (the impotent).⁵⁸⁰ The former were under disabilities as to adoption and institution of heirs while the latter were not.

(1) *Summary.* Looking back over the long catalogue of legal disabilities and incapacities which have existed in legal systems in different times and places, it will have been seen that imposition of disabilities and incapacities, or perhaps one should say rather refusal to

572. Sachsenspiegel, I, 4, 1 Homeyer, Sachsenspiegel (3 ed. 1861) 160.

573. Jolly, History of the Hindu Law of Partition, Inheritance and Adoption (1885) 275; Manu, ix, 201.

574. Homeyer, loc. cit.

575. Inst. 2, 12, 4; Cod. vi. 22, 8 (A.D. 521).

576. Jolly, loc. cit.

577. Homeyer, loc. cit.

578. Mayne, Hindu Law and Usage (10 ed. 1838) 725.

579. Ibid. 724.

580. Dig. 23, 3, 39, 1; 1, 7, 40, 2; 28, 2, 6.

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grant or backwardness in granting capacities, were long motivated by desire to maintain the general security or the security of social institutions, domestic, moral, religious, or political. Most of what has taken the form of restriction of legal capacity on religious grounds in the past has had behind it political purposes and was imposed with political ends in mind.⁵⁸¹ Chiefly, in the past legal incapacities have taken the form of subjection to the authority of some one with a power or duty of protection or else of restrictions designed to maintain the security of institutions. But in time men have learned better ways—i.e. ways involving less sacrifice of other interests and so less waste—of securing interests than by imposing incapacities. Today, except for some remnants of old conditions of incapacity lingering in legal systems, incapacities are chiefly imposed to protect those who are unable for defect or an immature will and judgment to look after themselves in the stress of economic existence in a complex social order. Thus the social interests to which incapacities in the law of today characteristically respond are the social interest in the individual life, in the protection of defectives and dependents, and in the protection of the economically insecure. Moreover, where disabilities long established in the law have been retained and reshaped in order to respond to those interests, they are now increasingly restricted and relaxed in order to

581. 1 Anson, *Law and Custom of the Constitution* (5 ed. 1922) 97-98, 123; Pollock, *Essays in Jurisprudence and Ethics* (1882) 157, 166.

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hold them in their operation to what is required for the purpose of protection, allowing full capacity for rights and as much capacity for acts and for legal transactions as is compatible with the degree of will and judgment attained or possessed by the individual and the condition of free self-determination open to him under the economic order of the time and place.

§ 126. ATTRIBUTES OF LEGAL PERSONALITY. French jurists under a category of attributes of personality include name, status, capacity, patrimony, and domicil.¹ German jurists do not use regularly the term "attributes" (*Eigenschaften*). Some say *Rechtsbeziehungen* or *Persönlichkeitsrechte*, in which they include all that the French take up under the term "attributes" except patrimony.² Following the English writers, status and capacity have been taken up in the preceding section. Anglo-American analytical jurists have not sought a category to include name, patrimony, and domicil. What little the common law has to say about name is said under the law as to economically advantageous relations. We have no legal conception corresponding to the French *patrimoine*, and with us domi-

1. Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 365, 375-418, 559-610, 2147-2153; 1 Josseland, *Cours de droit civil positif français* (2 ed. 1932) nos. 205-242, 646-655.

2. 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9 ed. 1903) §§ 24-37; 1 Dernburg, *Das bürgerliche Recht des deutschen Reichs und Preussens* (3 ed. 1906) §§ 50, 55-57; 1 Cosack und Mitteis, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) §§ 21-40.

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cil is treated of under Conflict of Laws. But for the purposes of comparative law the French classification is convenient, and it will be used to include name, matrimony, and domicile.

1. *Name*.³ Among primitive peoples each person has his one name, and this continues, as, for example, among the Hebrews and the Greeks, long after society has passed the primitive stage. The Romans developed a system of names consisting of a *praenomen* belonging to each individual, of which, however, there was but a limited number, a *nomen* or clan name, borne by all members of the *gens*, and later a *cognomen*, of which there was no fixed list, originally personal but which became hereditary like the *nomen*, and could serve to designate the different branches of the *gens*. The Germanic invaders brought back the system of single names, which prevailed in the earlier Middle Ages. But gradually a system of surnames grew up which became one of family names so that in Christendom one had as first name a Christian name by which he was baptized and a hereditary surname, typically that of his father. All this, however, was outside of the law. It was a matter of legally unregulated usage.

In Roman law ⁴ the texts have little to say. The Roman was free to change his name as he liked unless for fraud or malice.⁵ A woman in marriage took the name of her husband ⁶ and on

3. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 376-418; 1 Jossierand, *Cours de droit civil positif français* (2 ed. 1932) nos. 206-212; 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9 ed. 1903) § 36; 1 Dernburg, *Das bürgerliche Recht des deutschen Reichs und Preussens* (3 ed. 1906) §§ 55-56; 1 Cosack und Mitteis, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) §§ 39-40; 1 Enneccerus, Kipp und Wolff, *Lehrbuch des bürgerlichen Rechts* (13 ed. 1931) § 93.

4. Scialoja, *Sul diritto al nome* (1889).

5. Cod. 9, 25.

6. Cod. 5, 4, 10.

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the basis of this and other texts as to the dignities and titles of the husband the commentators and civilians worked out by analogy rules as to the widows retaining the name and the effect of remarriage and of divorce.⁷

In France there was no legal regulation till the sixteenth century. There were frequent changes of name especially by the newly rich. An ordinance of Henry II in 1555 forbade under penalties changes of name without letters from the King, and this was repeated in an ordinance of 1629.⁸ Free changes of name at the time of the French Revolution permitted by a law of 1793 led to a law of 1794, still in force, which forbade carrying any first name or surname other than those stated in the certificate of registration of birth.⁹ Not a little law has grown up as to how the names are to be registered, the effects of marriage, divorce, adoption, and so forth.¹⁰

As to German law ¹¹ "a person is forbidden to call himself by any name other than that acquired by birth,¹² order of a competent authority, adoption, marriage, or divorce."¹³ Use of another name entails a penalty.¹⁴ Unauthorized use of one's name by another may be enjoined, and if injury results there may be an action for damages.¹⁵

7. 24 Glueck, *Ausführliche Erläuterung der Pandekten* (1823) 352; 26 *id.* (1824) 475; 5 *id.* (1798) 410.

8. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 380.

9. 1 Jossérand, *Cours de droit civil positif français* (2 ed. 1932) no. 213.

10. *Ibid.* nos. 383-396.

11. For the law before the Code see Levi, *Vorname und Familienname im Recht* (1888).

12. German Civil Code, §§ 1616, 1706.

13. *Ibid.* §§ 412, 422, 428.

14. German Penal Code, § 360(8).

15. German Civil Code, §§ 12, 823.

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These, and like provisions in other systems following the Continental civil law, are based on the need of keeping an accurate record of all persons for police purposes.¹⁶ There are provisions in all of them for change of names by administrative proceedings.¹⁷

At common law originally only the Christian name was regarded.¹⁸ Hence later an indictment was defective unless it contained the Christian name of the accused or alleged that he had no Christian name or that it was unknown.¹⁹ This has now generally been changed by statute. Also use of initials instead of a Christian name before a surname has become a common practice and is now recognized.²⁰ In the case of a corporation we may well say that at common law a name is an attribute of legal personality. Blackstone says that in a corporation its name "is the very being of its constitution" and "the knot of its combination, without which it could not perform its corporate functions."²¹ But the Anglo-American polity does not admit of the official police record of every individual from birth to death which on the Continent precludes free changing of names. Hence at common law one may lawfully change his name by simply assuming

16. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 387-389. In Poland, a law of 1909 provided for changing names which were infamous, ridiculous, or not in keeping with human dignity. 1 Jossierand, *Cours de droit civil positif français* (2 ed. 1932) 213.

17. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932); Amos and Walton, *Introduction to French Law* (1925) 33.

18. *Button v. Wrightman*, Popham, 56 (1595); *Snook's Petition*, 2 Hilt. (N.Y.) 566, 568 (1859).

19. *Burton v. State*, 75 Ind. 477 (1881). In pleading the parties were referred to by their Christian names; it was the essential part of the name. *Gottlieb v. Alton Grain Co.*, 87 App.Div. 380, 84 N.Y.S. 413 (1903).

20. *Reg. v. Avery*, 18 Q.B. 576 (1852); *Monroe Cattle Co. v. Becker*, 147 U.S. 47, 13 S.Ct. 217, 37 L.Ed. 72 (1893); *Carleton v. Rugg*, 149 Mass. 550, 22 N.E. 55, 5 L.R.A. 193 (1889).

21. 1 Blackstone, *Commentaries on the Laws of England* (1765) 475.

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another and inducing people to call him by it.²² In England a name may be changed by act of Parliament or pursuant to royal license. In the United States it may be changed by act of the legislature or under statute by application to a court. Recourse may be had to these methods of preserving an official record of the change in order to satisfy a condition in a gift calling therefor, or in America, where there are so many naturalized citizens, in order to preserve proof of identity of the person bearing the new name with one who was naturalized under another. But they are not necessary. "All the law looks to is the identity of the individual."²³

There is much discussion in the Continental books as to whether there is property in a name. I shall consider this under the heading Intentional Interference with Advantageous Relations.²⁴

2. *Patrimony*.²⁵ By the term patrimony the French and those whose legal system is based on the French Civil Code mean the totality of a person's assets and liabilities so far as they can be assessed in money. For example, under the Roman system of universal succession it is the patrimony of the deceased to which his heirs succeed. The idea is one of the Roman law, used in con-

22. *Doe v. Yates*, 5 B. & Ald. 544 (1822); *Smith v. United States Casualty Co.*, 197 N.Y. 420, 90 N.E. 947, 26 L.R.A., N.S., 1167 (1910).

23. Daly, J., in *Petition of Snook*, 2 Hilt. (N.Y.) 566, 575, (1859). Cf.: "For names were invented for the purpose of distinguishing individuals and it is all the same if they can be identified by any other means." Inst. 20, 29.

24. *Post*, chap. 32; The common law has refused to recognize a right to one's name except where the name has acquired commercial value. Otherwise one can only assert it as a feature of the disputed right of privacy. *DaBonlay v. DaBonlay*, L.R. 2 P.C. 430 (1869); *Dockrell v. Dougall*, 78 Law Times N.S. 840 (1898); *Binns v. Vitagraph Co.*, 210 N.Y. 51, 103 N.E. 1108, L.R.A.1915C, 839 (1913).

25. 1 Windscheid, *Pandekten* (9 ed. 1906) § 42; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 2147-2152; 1 Josseland, *Cours de droit civil positif français* (2 ed. 1932) 640-655.

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nection with universal succession and universal execution. There is no such conception in the common law, where there were no such legal situations as those from which the Roman law derived it. Bankruptcy, where everything the debtor has which he might in any way have disposed of passes to the trustee or assignee, was introduced by legislation after common-law systematic ideas had been fixed. The recent Continental codes and those which follow them have in some things departed from Roman lines and do not use this term.

French jurists lay down that only legal persons can have a patrimony, that every legal person necessarily has a patrimony, that each legal person has only one patrimony, and that the patrimony is inseparable from the person. In French law all transfers of property *inter vivos* are transfers of particular items. Transfer of the whole patrimony can only take place after death of the person. All universal successions take place after death.²⁶ The Civil Code provides that one who contracts in his own name binds his property, both existing and thereafter acquired, to carry out his engagement.²⁷ Also that the property of the debtor is the security of all the creditors jointly, and that the proceeds of sale are to be distributed proportionally among them all unless some have a legal ground of preference.²⁸ Hence it is said that the claims of every creditor are a charge upon the whole patrimony of the debtor.²⁹ This does not mean that general creditors have a lien. But French law, when execution had been levied calls upon all creditors to come forward and put in their

26. Planiol, *op. cit.* no. 2148. But there is much theoretical discussion of the proposition that the patrimony is inseparable from the person and of the doctrine that patrimony is an attribute of personality. See Josserand, *op. cit.* nos. 654-655.

27. Art. 2092.

28. Art. 2093.

29. 2 Planiol, *Traité élémentaire de droit civil* (11 ed. 1932) no. 180.

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claims so that the assets which are regarded as security for the debts due them may be fairly divided.

Although on principle a person can have but one patrimony, the system of universal succession and need, on the one hand, of protecting the solvent heir of an insolvent estate and the creditors of a solvent estate which has passed to an insolvent heir, lead to two exceptions. First, in case of an heir who has accepted an inheritance with benefit of inventory, he has thus prevented the liabilities of the deceased from attaching to his own patrimony. Second, where an insolvent person has inherited a solvent estate, the creditors of the latter can preserve their security by procuring a separation of the patrimonies. It is this situation which gives the idea of the patrimony importance in French law. Under the old regime in the south of France (*pays de droit écrit*) the estate of the deceased formed a single mass, succession to which was governed by the Roman law of Justinian's Novels 118 and 127. The only exception was succession to fiefs as to which throughout France there was primogeniture and males were preferred. In the north of France (the *pays de coutumes*) there were different rules of succession as to property acquired by purchase (i.e. otherwise than by inheritance) and immovables acquired by succession to a relative. In the latter case succession depended on whether property was acquired from the paternal or from the maternal side. Those who framed the Civil Code laid down a uniform system for the whole country based on a fundamental principle that the estate is a single mass, called the principle of the unity of the patrimony.³⁰

3. *Domicil*.³¹ In Roman law certain municipal duties were to be performed where one had the permanent

30. Esmein, *Cours élémentaire d'histoire du droit français* (15 ed. 1925) 195-206, 717; Brissaud, *History of French Private Law* (transl. by Howell 1912) 626-683.

31. 1 Beale, *Conflict of Laws* (1935) chap. 2; American Law Institute, *Restatement of the Law of Conflict of Laws* (1934) §§ 9-41; Dicey, *Digest*

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seat of his affairs (*domicilium*). Also the period of prescription was different according to whether the parties concerned had their domicils in different provinces or in the same province. The domicil was said to be the place "where one has established his household goods and the greater part of his property and fortunes."³² This idea of a permanent situs of a person's legal existence and activities, of little relative importance when except for certain divergent local customs there was one law throughout the civilized world, has become of great importance in a world of separate politically organized societies, each with its own law, and of increasing economic unification and everyday transactions transcending state lines. Domicil is a fundamental conception in the conflict of laws. But while domicil to the extent of a permanent establishment of a person at some place is a universal legal conception there is no universally accepted doctrine as to important features of what is involved.

There is a dispute whether a domicil is a place³³ or

of the Law of England with Reference to the Conflict of Laws (5 ed. 1932) 65-140; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 554-608; 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9 ed. 1903) § 36; 1 Dernburg, *Das bürgerliche Recht des deutschen Reichs und Preussens* (3 ed. 1906) § 57; 1 Cosack, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) § 41.

32. Cod. 10, 40, 7, also 40, 2 and 40, 5.

33. "The place where a person has established the principal seat of his abode and of his affairs." Pothier, *Introduction générale aux coutumes*, no. 8, 1 *Oeuvres de Pothier* (3 ed. Buguet, 1890) 3; "Domicil is the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by law." American Law Institute, *Restatement of the Law of Conflict of Laws* (1934)

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a relation of a person to a place.³⁴ Planiol insists that domicile is place³⁵—the place in relation to which the law treats one's status and capacities and many of his activities, and this is the Roman usage, that of the pandectists such as Savigny, and of Anglo-American jurists. The idea underlying domicile, as the Latin term implies, is that of home, distinguished from other dwelling places by the intimacy of the relation between the person and the place.³⁶

According to the Anglo-American common law every person has a domicile at all times and can have no more

§ 9; "The domicile of any person is the country which is considered by English law to be his permanent home. This is (1) in general the country which is in fact his permanent home; (2) in some cases the country which, whether it be his home or not, is determined to be so by a rule of English law." Dicey, *Conflict of Laws* (5 ed. 1932) 65. So Savigny: "That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode, and thus for the center at once of his legal relations and his business." 8 Savigny, *System des heutigen römischen Rechts* (1849) § 353, p. 58, transl. by Guthrie, Savigny, *On the Conflict of Laws* (2 ed. 1880) 57. But this was before the German Civil Code.

34. "The juridical relation existing between a person and a place." 1 Aubry et Rau, *Droit civil français* (3 ed. 1878) § 141; "The permanent establishing of a person in a place." 1 Dernburg, *Das bürgerliche Recht des deutschen Reichs und Preussens* (1906) 155, following the German Civil Code, art. 7: "A person who habitually resides in a certain place establishes his domicile in that place." But cf. "The place which is the focus of his private relations of life." 1 Cosack, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) 79.

35. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 555.

36. American Law Institute, *Restatement of the Law of Conflict of Laws* (1934) § 13. As Cosack puts it, it is the place where one, whenever and wherever absent or living elsewhere for a time, intends to return and would be *zu Hause*, *Lehrbuch des bürgerlichen Rechts* (1927) 79.

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than one domicil at one time.³⁷ Hence the law assigns to him a domicil of origin which continues to be his domicil unless and until he acquires a new one. The domicil of origin is acquired at birth and is that of the father at the time of its birth, if the child is legitimate, but if not that of the mother at the time of birth.³⁸ But a person with legal capacity to change his domicil may acquire a domicil of choice by establishing a dwelling place with the intention of making it his home. This requires concurrence of two facts: Physical presence at a dwelling place and intention to make it a home. When these facts have coexisted, even if they later cease to exist, the domicil remains until a new domicil of choice is acquired somewhere else.³⁹ In general, the wife has the same domicil as that of her husband. But in American law if she lives apart from her husband without desertion according to the law of their domicil at the time of separation, she may have a separate domicil.⁴⁰ A minor child has the same domicil as that of the father, but if emancipated can acquire a domicil of choice. In case of divorce or judicial separation its domicil is that of the parent to whom the court has given its custody, or if custody has not been awarded, the domicil of the parent with whom

37. American Law Institute, *Restatement of the Law of Conflict of Laws* (1934) § 11.

38. *Ibid.* § 14.

39. *Ibid.* § 15.

40. *Ibid.* §§ 27-28.

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it lives. If it lives with neither it retains the domicil of the father.⁴¹ If after coming of age a person becomes mentally incompetent to acquire a domicil of choice and no guardian of his person is appointed, his domicil remains what it was before he became insane. If he becomes insane before coming of age and continues to live with his parent his domicil is that of the parent so long as he remains insane. If he no longer lives with the parent his domicil remains what it was when he separated from the parent.⁴² A juristic person has its domicil in the state where it was incorporated.⁴³

French law raises some important questions as to domicil and has one important difference. Most French writers hold that no person can be without a domicil.⁴⁴ But Planiol argues against this considering it an inadmissible deduction from the literal terms of the Civil Code as to change of domicil. Vagabondage, he says, exists in law as well as in fact even if it is by law made a crime.⁴⁵ Domat had considered that one could have but one principal domicil and that what were called secondary domicils were only residences. But the law before the Code came to recognize special domicils which could be acquired without loss of the principal domicil. The Code, however, adopted the doctrine of unity of domicil.⁴⁶ Yet French law allows what is called election of domicil whereby one may set up a special

41. Ibid. §§ 30-32.

42. Ibid. § 40.

43. Ibid. § 41.

44. 1 Jossierand, *Cours de droit civil positif français* (2 ed. 1932) no. 236.

45. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 596.

46. Ibid. no. 597.

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domicil at a place of business for certain purposes. It is a special domicil established only for the designated purposes and of no effect for anything else, but will continue till those purposes are accomplished and cannot be changed solely at the will of the person who has established it.⁴⁷

German law differs from the common law and from French law on this subject in some significant respects. It does not recognize a distinction between domicil of origin and domicil of choice. It holds that one may have no domicil, that domicil may exist at the same time in a number of places, and that domicil may be lost by ceasing to live in a place with the intention of abandoning it, without acquisition of any other.⁴⁸ Otherwise it is substantially the same as the common law. Indeed, the common law on the subject is not an English or American product. It was built upon the law developed on the basis of the scanty Roman texts by the commentators and later the pandectists in Continental Europe from the fourteenth to the nineteenth century, taken to be a part of a universal law of Christendom.⁴⁹

§ 127. BEGINNING AND TERMINATION OF LEGAL PERSONALITY. 1. *Beginning*.⁵⁰ Beginning of natural legal personality is conditioned by birth. The Romans held, and this has been adhered to ever since,

47. Ibid. nos. 599-607.

48. German Civil Code, § 7.

49. Story, *Commentaries on the Conflict of Laws*, §§ 10-16 (1834). See Pound, *The Church in Legal History*, Jubilee Law Lectures, Catholic University of America, 16-17 (1939).

50. 2 Savigny, *System des heutigen römischen Rechts* (1840) §§ 61-62 (transl. by Rattigan as Savigny, *Jural Relations*, 1884) 3-12; 1 Dernburg, *Pandekten* (8 ed. 1911) § 40; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 52-53; 1 Cosack, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) § 24; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 366-374.

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that this means complete separation of a living being from the mother.⁵¹ It must have lived after complete separation, but the duration of life is no matter. Justinian did away with the dispute whether it was necessary that the child have cried after birth.⁵² It must have had human form (i.e. not have been a *monstrum*)⁵³ but mere deviations from ordinary human form, such as too many or too few members, did not matter.⁵⁴ The civilians added a requirement of capacity of living—that the child must not only be born alive but must be born “viable,” and so must not die immediately after birth because of an immature condition making continuance of life impossible. But such was not the Roman law.⁵⁵ The French Civil Code, following the civilian doctrine, requires birth living and viable.⁵⁶ As this requirement may make a great difference upon death of the parent, determining whether the heir of the child or the heir of the parent shall take, Planiol points out that it has led to much litigation to determine the fact. The Spanish Civil Code requires that the child live twenty-four hours to establish

51. Cod. 6, 39, 3 (A.D. 530).

52. Ibid.

53. Ibid.

54. Dig. 1, 5, 14.

55. 2 Savigny, *System des heutigen römischen Rechts* (1840) (transl. by Rattigan, Savigny, *Jural Relations*, 1884) 284–299, referring also to the older codes.

56. French Civil Code, arts. 725, 906.

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that it is viable.⁵⁷ The Italian Civil Code creates a presumption of capacity of living.⁵⁸ The German Civil Code and Swiss Civil Code, and most recent codes following them, require only birth alive.⁵⁹ At common law the requirement is that the child be born alive.⁶⁰ As in Roman law, a monster has no legal personality, but deformities do not matter if there is human shape.⁶¹

Two questions arise upon the general principle and have been much discussed, namely, one as to cases where the law for certain purposes treats an unborn child in its mother's womb as having capacity for rights if afterwards born alive, the other as to cases where an injury wrongfully caused to the mother before birth is claimed

57. Spanish Civil Code, art. 30.

58. Italian Civil Code, art. 725.

59. German Civil Code, art. 1; Swiss Civil Code, art. 31; Civil Code of Brazil, art. 2.

60. Coke, Third Inst. (1644) 50. This means "carrying on its being without the help of the mother's circulation." Wright, J., *Rex v. Pritchard*, 17 T.L.R. 310 (1901); *Rex v. Enoch*, 5 Carr. & P. 539 (1833); *Reg. v. Wright*, 9 Carr. & P. 754 (1841). The question is not whether it has breathed but whether it had a separate circulation. *Rex v. Brain*, 6 Carr. & P. 350 (1834); *Reg. v. Trilloe*, 2 Moody C.C. 260 (1842). The English cases hold that this separate circulation is possible although the umbilical cord has not been severed. *Reg. v. Trilloe*, *supra*; *Reg. v. Reeves*, 9 Carr. & P. 25 (1839). In *Goff v. Anderson*, 91 Ky. 303 (1891) it was held that a child is born alive if alive and breathing when it becomes external of the mother although the umbilical cord has not been cut, even if it has not strength to breathe enough to establish independent circulation. The English and American cases agree that if born alive the child need not be born viable. The Kentucky court adopts the view of older cases in England. *Rex v. Poulton*, 5 Carr. & P. 329 (1832). The civilians made independent circulation the test. 1 Dernburg, *Pandekten* (8 ed. 1911) § 51.

61. Coke, *Commentary on Littleton* (1628) 7-8; 2 Blackstone, *Commentaries* (1766) 246-247.

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to have resulted in birth of the child in a defective condition and the child sues for the injury to itself independent of the injury to the mother.⁶²

As to the first, in Roman law a text of the Digest tells us that "unborn children are in almost every branch of the civil law regarded as clearly existing."⁶³ It is added that statutory inheritances are restored to them if born after death of the person to whom they stand in succession, and that if a woman with child is taken prisoner and the child is born it comes under the law of *postliminium*.⁶⁴ Also, when the unborn child would be heir if alive at death of the one to whom it is in succession a curator may be appointed to preserve the estate for it pending birth.⁶⁵ Accordingly, the civilians have a maxim: *Nasciturus pro jam nato habetur*.⁶⁶ But the operation of the rule was conditioned on the child being afterward born alive. No one could succeed to an unborn child. The rule could not be of advantage to others unless the child was born.⁶⁷ It was a rule in the interest of the child itself.⁶⁸ Paul in the Digest explains the ground on which it proceeded: "The ancients waited for the birth of an unborn child in order that they might preserve all rights for it undiminished to the time of birth."⁶⁹ Some have argued that this has the effect of making the unborn child a legal person, a

62. Salmond, *Jurisprudence* (10 ed. 1947) § 114; Winfield, *The Unborn Child* (1942) 4 *University of Toronto Law Journ.* 278; Barry, *The Child en Ventre sa Mere* (1941) 14 *Australian Law Journ.* 351.

63. Dig. 1, 5, 26.

64. *Ibid.*

65. Dig. 26, 5, 20.

66. 1 Dernburg, *Pandekten* (8 ed. 1911) § 50.

67. Dig. 50, 16, 231.

68. Dig. 1, 5, 7.

69. Dig. 5, 4, 3.

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question which will be considered in connection with the next point. The French Civil Code applies the Roman doctrine to successions,⁷⁰ to gifts and legacies,⁷¹ to acquisition to national character. The law today also applies it to recognitions of parenthood, and to workmen's compensation claims.⁷² The German Civil Code adopts it only as to succession.⁷³ A curator may be appointed to preserve the estate pending birth.⁷⁴ Some recent codes contain a general provision giving capacity for rights to unborn children between conception and birth, conditional on being born alive.⁷⁵ In the common law it was considered by the judges in 1694 that before birth a child was not taken by the law to be living for any purpose. But in that year the Common Pleas and the King's Bench on error therefrom having so held, the judgment was reversed on error by the House of Lords contrary to the opinion of the judges who, the report tells us, did not "change their opinions thereupon" but continued to think the law "clear and certain" to the contrary.⁷⁶ The reason given in the House of Lords was that it could not have been the intention of the testator "to disinherit the heir of the name and family" upon "such a nicety" as his having been born six months after the termination of the particular estate. In 1714 the Chancellor considered that as Coke had laid down that an infant *en ventre sa mere* might be vouched "if God give him birth,"⁷⁷ and that "the mother may be guilty of the murder of a child *en ventre sa*

70. Art. 725.

71. Art. 906.

72. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 367.

73. German Civil Code, §§ 1923, 1942.

74. *Ibid.* § 1912.

75. Swiss Civil Code, art. 31; Civil Code of Brazil, art. 4; Chinese Civil Code, art. 7.

76. *Reeve v. Long*, 3 Lev. 408 (1694).

77. *Coke on Littleton*, 390a.

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mere if she takes poison with intent to poison it and the child is born alive and afterward dies of poison,"⁷⁸ equity in order that the child should be provided for should treat a posthumous child as living at the time of the father's death.⁷⁹ A statute of 1699⁸⁰ enabled posthumous children to take under marriage settlements as if born in a father's lifetime. This statute did not cover gifts in wills, but the doctrine was extended to all cases where it was to the interest of the child to be considered as having been born. Accordingly Blackstone says: "An infant *en ventre sa mere* is supposed in law to be born for many purposes. It is capable of having a legacy or surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use and to take afterward by such limitation as if it was then actually born."⁸¹ All this presupposes that the child is afterward born alive. Later it was held that marriage and birth of a posthumous child would work revocation of a will made before marriage.⁸² Also the doctrine was extended to cases under the rules against perpetuities where there is no benefit to the child but no prejudice to it and a benefit to others.⁸³ Otherwise the doctrine is applied only where it is beneficial to the child.⁸⁴ It has been said that the benefit to the child must be direct.⁸⁵ Also it is said, and this bears on the

78. 3 Inst. (1644) 50.

79. *Jenner v. Harper*, 1 P.Wms. 247 (1714). So also *Burdct v. Hopegood*, id. 486 (1718).

80. 10 & 11 Wm. 3. c. 16.

81. 1 Blackstone, Commentaries (1765) 130.

82. *doe d. Lancashire v. Lancashire*, 5 Term.Rep. 49 (1792).

83. *Re Wilmer's Trusts*, [1903] 2 Chan. 411.

84. *Blasson v. Blasson*, 2 DeG.J. & S. 665 (1864); *Villar v. Gilbey*, [1907] A.C. 139; *Elliot v. Joicey*, [1935] A.C. 209, 218.

85. *Elliot v. Joicey*, [1935] A.C. 209, 218 (*semble*).

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question whether the law sets up a fictitious legal person, that there is here not a matter of interpreting the instrument creating the right reserved for the unborn child, but rather there is a fiction of legal personality of the unborn child as the only way of giving effect to a presumed intention in case the child is afterward born alive.⁸⁶

As to the second question, namely, whether where an injury to the mother resulting in birth of a defective child may be a cause of action for the child, or for some one under Lord Campbell's Act or similar statute if the child born alive died as a result of the defective condition,⁸⁷ some of the codes in the domain of the civil law,⁸⁸ and construction of the civil code of California⁸⁹ allow

86. *Trower v. Butts*, 1 Sim. & Stu., 182, 184 (1823); *Elliot v. Joicey*, [1935] A.C. 209, 218.

87. Markby, *Elements of Law* (6 ed. 1905) § 122; Gray, *Nature and Sources of the Law* (2 ed. 1921) 38-39; Salmond, *Law of Torts* (10 ed. 1945) 346; Salmond, *Jurisprudence* (10 ed. 1947) § 114; Paton, *Jurisprudence* (2 ed. 1951) 317; Windscheid, *Pandekten* (9 ed. 1906) § 52.

88. Austrian Civil Code (1811) arg. from art. 22, 1 Ehrenzweig, *System des österreichischen Privatrechts* (6 ed. § 63, p. 144, 1925); Swiss Civil Code, art. 31 (1907), Egger, *Kommentar zum schweizerischen Zivilgesetzbuch* (2 ed. 1930) 292; Civil Code of Brazil (1916) art. 4; Civil Code of Japan (1896) § 761; Chinese Civil Code (1930) art. 7. See also *Montreal Tramways v. Leveille*, [1933] 4 D.L.R. 337. The provisions of the French Civil Code seem limited to succession and to rights to gifts and legacies. It has been supposed that French law and German law do not allow a child a remedy *ex delicto* for injuries done to it before birth. But it has been suggested that in Louisiana, in view of a rule of construction in the Civil Code, the courts might give a broader construction to art. 29 of the Civil Code and permit the action. Note, *Infants, Prenatal Injuries, Right of Action in Tort* (1939) 13 *Tulane Law Rev.* 632, 634.

89. Cal.Civ.Code, § 29; *Scott v. McPheeters*, 33 Cal.App.2d 629, 92 P.2d 678, 93 P.2d 562 (1939).

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the action. Many American courts have had the question before them and an overwhelming majority long denied the action.⁹⁰ The grounds of denying the action were want of precedent, that the statute sued on did not "embrace plaintiff's intestate within its meaning;"⁹¹ that the child although it lived ten or fifteen minutes, had not at the time of the injury to the mother become a legal person with *locus standi* in the law;⁹² remoteness, since the injury to the child was not direct but was transmitted through the injury to the mother;⁹³ that where plaintiff, born crippled and deformed after a train accident was not a passenger at the time of the accident⁹⁴ and there was no contract duty toward him;⁹⁵ and insuf-

90. Dietrich v. Northampton, 138 Mass. 14 (1884) opinion by Holmes, J.; Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225 (1900) one judge dissenting; Smith v. Luckhardt, 299 Ill.App. 100, 19 N.E.2d 446 (1939); Gorman v. Budlong, 23 R.I. 169, 49 A. 704, 55 L.R.A. 118 (1901); Buel v. United R. Cos., 248 Mo. 126, 154 S.W. 71, 45 L.R.A.,N.S., 625 (1913); Lipps v. Milwaukee R. Co., 164 Wis. 272, 159 N.W. 916, L.R.A.1917B, 334 (1916) injury before child could be born viable; Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503 (1921) Cardozo, J. dissenting; Stanford v. St. Louis R. Co., 214 Ala. 611, 108 So. 566 (1926); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1941) divided court. So also 4 American Law Institute, Restatement of the Law of Torts (1939) § 869.

91. Dietrich v. Northampton, 138 Mass. 14 (1884).

92. Ibid.

93. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225 (1900).

94. Walker v. Great Northern R. Co., 28 L.R.Ir. 69, 88 (1891).

95. Ibid. 84.

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iciency of medical knowledge to give reasonable assurance of probable causation.⁹⁶

We need not be troubled by the point as to the carrier-passenger relation made in the Irish case,⁹⁷ nor by the point as to duty toward an unborn child made in many of the cases since it was first raised in Massachusetts in 1884.⁹⁸ Today we do not rest the liability of a carrier upon contract nor upon implication from the carrier-passenger relation. Nor do we today look for a person toward whom there is a duty of care as the means of fixing the ambit of the unreasonable risk of injury created by negligent conduct. The true basis of the older decisions was that, as medical knowledge stood at the time there was no assurance on reasonable balance of probability that the condition of the child at birth could be attributed to the injury to the mother before birth.

But as a result of better medical knowledge and consequent assurance of probability as to causation, the course of judicial decision has completely changed and American courts now generally allow the action.⁹⁹

96. *Dietrich v. Northampton*, 138 Mass. 14 (1884); *Nelson v. Galveston R. Co.*, 78 Tex. 621, 14 S.W. 1021, 11 L.R.A. 391 (1896); *Smith v. Luckhardt*, 299 Ill.App. 100, 19 N.E.2d 446 (1939); *Bonbrest v. Kotz*, 65 Fed.Supp. 138 (1946); *Montreal Tramways v. Leveille*, [1933] 4 D.L.R. 337 (dissenting opinion).

97. *Supra* n. 94

98. *Dietrich v. Northampton*, *supra* n. 96.

99. *Tucker v. Howard L. Carmichael & Sons Inc.*, 208 Ga. 201, 65 S.E.2d 909 (1951); *Amann v. Faigy*, 415 Ill. 422, 114 N.E.2d 412 (1953) overruling *Allaire v. St. Luke's Hospital*, *supra* n. 93; *Damasiewicz v. Gorsuch*, 197 Md.

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Without postulating legal personality before birth or a duty to that personality, we may say that where one has created an unreasonable risk of injury to others and some one is born afterward with resulting defects, the interest of that defectively born person may be secured by imposing liability on the one who caused the defects. When the common law makes an insane person's property or the property of an infant of tender years answer for an aggression injurious to another we do not personify the property¹⁰⁰ or the estate, nor need we personify the estate of a deceased to hold it for a wrong he did in his lifetime either to a living person or causing injury to one born after his act. The need of a legal personality when the property is seized or in some living person to be injured when the act is done is procedural. The difficulty comes from our having thought procedurally since the Romans. That there must be some legal person to sue and to be sued when the act is done and the cause of action arises comes to be an idea that there must be then and there a legal person having a legal right and another legal person having at that very time a corresponding

417, 79 A.2d 550 (1951); *Rainey v. Horn*, 221 Miss. 269, 72 So.2d 434 (1954); *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (1953) overruling *Buel v. United Rys.*, *supra* note 90; *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951) overruling *Drobner v. Peters*, *supra* n. 90; *Williams v. Marion Rapid Transit Inc.*, 152 Ohio St. 114, 87 N.E.2d 334, 10 A.L.R.2d 1051 (1949) overruling older decisions in that state; *Montreal Tramways v. Leveille*, [1933] 4 D.L.R. 337; *Tursi v. New England Windsor Co.*, 19 Conn.Super. 242, 111 A.2d, 14 (1955).

100. *McIntyre v. Sholty*, 121 Ill. 660, 664, 13 N.E. 239 (1887); *Bullock v. Babcock*, 3 Wend. 391 (1825).

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legal duty. What the law must really consider, however, is the claim of a concrete human being who has suffered an injury and what we may do to repair that injury to satisfy his claim. To impose liability on one who has done something without justification or privilege which has resulted in infringing a legally recognized and secured interest of a human being as things are now is simply to carry out the task of the law. Right, duty, and personality are convenient juristic conceptions to enable us to secure interests. But the interests are the primary thing to which we must always direct our thinking. The juristic conceptions must be fitted to the task, not the task to the conceptions.

2. *Termination.*¹⁰¹ As a general proposition, as to natural persons, legal personality begins at birth and ends at death. But at times and places the law has in certain cases treated the legal personality as extinct while the natural person was still alive. These might well be put in a general category under the name of civil death, since the natural personality persists after the legal personality is gone. The term "civil death," however, has technically been appropriated to one species, so that the term can be used in the broader sense only with that reservation.

101. Salmond, *Jurisprudence* (10 ed. 1947) § 113; Paton, *Jurisprudence* (2 ed. 1951) 316-318; 1 Windscheid, *Pandekten* (9 ed. 1906) § 53; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 371-374; 1 Cosack, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) §§ 26-27.

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In Roman law a person might undergo *capitis deminutio*,¹⁰² diminution of legal personality, the exact nature of which is in dispute. There were three kinds or grades: *maxima* when one lost both liberty and citizenship, as when enslaved, *minor* or *media* when one lost citizenship but retained liberty, as when one was interdicted from fire and water or deported to an island, i.e. banished, and *minima* when a person *sui iuris* became subject to the authority of another.¹⁰³ In the first two both agnation and cognation were destroyed.¹⁰⁴ But as *capitis deminutio* was a matter of civil law while cognation was a tie of natural law, cognation was not affected by *capitis deminutio minima*.¹⁰⁵ It looks as if when the legal personality was extinguished a natural personality remained and when all natural persons came to be held legal persons there was a new legal personality in place of the one that was lost. This could not happen in case of slavery, but would explain the lesser effect of *capitis deminutio minor* and *minima*. The person adopted into another kin group has by the strict law lost one legal personality and acquired another. But the praetor considered that where one bound in an obligation underwent

102. Buckland, Text-Book of Roman Law (2 ed. 1932) 134-141; Eisele, Beiträge zur römischen Rechtsgeschichte, VIII, Zur Natur und Geschichte der *capitis deminutio* (1896) 160-216; Desserteaux, Études sur la formation historique de la *capitis deminutio* (2 vols. 1909, 1919).

103. Gaius, 1, 158-163; Inst. 1, 16, 1-6.

104. Inst. 1, 16, 6.

105. Ibid. 1, 15, 3, 1, 16, 6.

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capitis deminutio he was still subject to a natural obligation and would allow an action "as if *capitis deminutio* had not taken place." ¹⁰⁶ *Capitis deminutio* did not pass into the modern civil law although some writers as late as the last century sometimes wrote as if it had. ¹⁰⁷

In Germanic law the one penalty for all offenses against the state was to put the offender outside of the law. Both himself and his property lost all protection. Every one was considered bound to attack him as a public enemy. His house was burned and his land ravaged or later confiscated. ¹⁰⁸ It connects historically with civil death. ¹⁰⁹

In France, monks, in consequence of their renunciation of the world, and convicted persons condemned to capital punishment were said to be civilly dead. As to monks, the church held that one who entered a religious order became dead to the world. This would seem to require that he had lost capacity to acquire, and that what he had at the time of entering the monastery should be

106. Dig. 4, 5, 1. "The conception that one who has entered into a new household position with a new name should stand legally as a new person is one that arises naturally." 1 Dernburg, Pandekten (8 ed. 1911) § 40, 6. *Capitis deminutio minima* would dissolve a partnership, but if the partners consented to go on it was held this made a new partnership. Gaius, 3, 153.

107. 2 Savigny, System des heutigen römischen Rechts (1840) § 75, Savigny, Jural Relations (transl. by Rattigan, 1884) 110-111; Dernburg, loc. cit.

108. Brissaud, History of French Private Law (transl. by Howell, 1912) 466-468.

109. 2 Savigny, System des heutigen römischen Rechts (1840) § 63, Savigny, Jural Relations (transl. by Rattigan, 1884) 13-16.

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acquired by heirs. But Justinian's Code and later legislation provided that the monk could acquire nothing for himself but could take for the monastery. All his property present and future went to the monastery including what came to him by inheritance.¹¹⁰ Under the Theodosian Code the monk's heirs took upon intestacy or by will what he had at entrance in the monastery, as upon death, the monastery only taking what came to him after entrance or if he had no heirs and left no will at entrance.¹¹¹ This treated him as dead as to the past but as having a capacity to take and transmit to the monastery, in other words, a new partial capacity, for the future. The old French law accorded with this. Also after entering the monastery he could not take either for himself or for the monastery by will or on intestacy but was treated as having died at entry.¹¹² Civil death by way of punishment in the old French law had something in it of outlawry of the Germanic law, something of *capitis deminutio* and *existimationis minutio* of Roman law, and something of excommunication in the canon law. The Germanic outlawry was a complete civil death, depriving the outlaw of all standing before the law and recognizing no natural person as still subsisting. Banishment and excommuni-

110. Cod. 1, 2, 13 (A.D. 455); Cod. 1, 3, 20 (A.D. 434); Nov. 5, 5 (A.D. 535); Nov. 76 (A.D. 538); Nov. 123, 38 (A.D. 546).

111. Cod. Theod. 5, 3, 1.

112. Brissaud, *History of French Private Law* (transl. by Howell, 1912) 880-881.

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cation did not go so far. Most capacities were gone. But one still had a claim to live although he could not assert it in court. Roman ideas were used upon these Germanic customs and the term civil death got a technical meaning. It was likened to natural death, but did not go to the extent of full deprivation of all capacities. After all, there was a natural person left and either that natural person must be recognized as a new legal person for some purposes with some capacities as such or the operation of civil death had to be limited. Thus the person civilly dead was allowed to do such things as were necessary in order to live. A marriage he had contracted before condemnation was not dissolved as the sacramental tie was beyond the reach of the civil law. But no legal effects would be allowed to follow. The system of possession by husband and wife came to an end. But the spouse was still married and could not contract a new marriage. The property of the person civilly dead was confiscated and he could acquire nothing beyond a gift for maintenance.¹¹³ As the law stood in the eighteenth century there was civil death in case of sentence to death, to the galleys for life, and to banishment for life.¹¹⁴ It was enacted in the Civil Code in 1804.¹¹⁵ As there set forth the chief effects of civil death were: The whole estate of the per-

113. Ibid. 884-885.

114. Pothier, *Introduction aux coutumes*, nos. 30-32, 1 *Oeuvres*, ed. Bugnet (3 ed. 1890) 8-9.

115. Art. 25.

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son becoming civilly dead passes to his heirs as on intestacy; he loses all capacity for civil rights, but retains capacity for natural rights. So he can acquire nothing by succession except by a legacy for maintenance. He can have no heirs either testamentary or on intestacy. Anything he may have acquired during the time of his civil death passes to the state on his natural death. He can neither give nor receive gifts except for necessities. A marriage subsisting at the date of civil death is dissolved as to all legal effect and a marriage contracted after civil death is invalid as to all legal effect. But he was competent to buy, barter, lease, hire, and loan, and to enforce claims for injuries or other wrongs.¹¹⁶ This was repealed and civil death was abolished in 1854.¹¹⁷ It would hardly be worth while to go so fully into the provisions of the French Civil Code as they stood originally were it not that they raise questions that must be considered in connection with American legislation as to civil death of life convicts.

At common law ¹¹⁸ originally civil death took place in three ways: (1) When a person was banished; (2) when he abjured the realm (that is, underwent a self-imposed banishment, taking an oath not to return to the kingdom unless by permission—a means whereby con-

116. Ibid.

117. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) no. 374.

118. 1 Blackstone, *Commentaries on the Laws of England* (1765) 132.

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fessed criminals who had fled to a sanctuary might save themselves), or (3) when he "entered into religion," that is, went into a monastery and became a monk renouncing this world.¹¹⁹ Such persons were considered as entirely cut off from society. Their heirs inherited their property, as in case of natural death, and administration might be granted on their estates.¹²⁰ The case of civil death by entering a monastery became obsolete at the Reformation,¹²¹ and the other two cases came to an end with the obsolescence of banishment and sanctuary. But in a number of American states there are statutes providing that persons convicted of crimes and adjudged to imprisonment for life shall be civilly dead.

In this legislation and in the application of it by the courts we see the same confusion and the same difficulties Savigny found in Art. 25 of the French Civil Code and doctrinal development and application of it. After the natural person has become civilly dead a natural person remains and in modern law where there is a natural person there is also a legal person so that the question is as to the capacity for rights and otherwise of this new person. The French Civil Code laid down that for the future he had natural but not civil rights.¹²² But aside from the

119. *Libr. feud.* ii, 21.

120. *Co.Lit.* (1628) 133.

121. *Rex v. Portington*, 1 Salk. 162 (1693).

122. 2 Savigny, *System des heutigen römischen Rechts* (1840) § 75, Savigny, *Jural Relations* (transl. by Rattigan, 1884) 113.

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difficulty of determining what are natural rights in this connection there is a question whether natural rights not recognized and secured by positive law can be meant. The Supreme Court of California tells us, as did Art. 25 of the French Civil Code, that "civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law."¹²³ But one's natural right of corporal integrity depends for its efficacy on provisions of positive law as to trespass upon the person. The new legal person, made of the old natural person shorn of his original legal personality, must have himself capacity for rights and yet cannot be suffered to exercise capacities incompatible with the condition of imprisonment for life. How to recognize the legal existence of the natural person and yet preserve the idea of civil death and limit capacity of the life convict to such things as are compatible with his condition has been before the courts under these statutes in many ways. It has been held that where the life convict is wrongfully killed his administrator can recover under statutes as to death by wrongful act.¹²⁴ Where one entitled to a remainder under the will of his father, with conditional limitation over in case of his death during the term of the particular estate, was convicted and sentenced to imprisonment for life before the particular estate terminated,

123. *Estate of Donnelly*, 125 Cal. 417, 419, 58 P. 61 (1899).

124. *Breed v. Atlanta B. & C. R. Co.*, 241 Ala. 640, 4 So.2d 315 (1941).

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the will was construed to mean natural not legal death of the remainderman. Also it was held that the title to land was not divested by the civil death provided for by the statute. The statute was construed with reference to common law attainder, forfeiture, corruption of blood. One judge dissented arguing that the statute meant civil death as at common law, not a confusion of common law civil death and attainder for felony.¹²⁵ In another case it was held that death in a policy of life insurance meant natural not civil death, and an administrator of the life convict while he was naturally alive could not sue on the policy. The court considered that the risk against which the insurer insured was "natural actual" death not civil death. But it went on to say that the statute as to personality deprived the person civilly dead of his property and that his capacities among his fellow members of society were extinct.¹²⁶ In California, the court holds that the claim of the life convict as distributee of a deceased parent is put an end to by the statute.¹²⁷ It should be noted that the former French law would allow the claim to the extent of maintenance. Under the statute the rights of the creditors of the life convict are not affected or suspended. Creditors can sue and reach his property and subject it to payment pending imprisonment. They are

125. *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148, 1 L.R.A. 264 (1888).

126. *Sullivan v. Prudential Insurance Co.*, 131 Me. 228, 160 A. 777 (1932).

127. *Estate of Donnelly*, 125 Cal. 417, 58 P. 61 (1899).

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not bound to have the estate administered.¹²⁸ It has been said also that the convict's rights, subject to his personal restraint, are not affected except as specially provided by statute.¹²⁹ It is obvious that this legislation making a person who has been sentenced to imprisonment for life civilly dead is not only out of line with the common law but is unnecessary and indeed indefensible. Under conditions of imprisonment for life today it by no means follows that the life convict will spend all his life in prison. Parole and pardon are quite possible and a human being going about without legal rights is quite unthinkable in the world today. It would be quite enough that imprisonment should create legal incapacity for things which are incompatible with the condition of being imprisoned.

Legislation as to judicial declaration of death of persons long absent and unheard from does not have the effect of terminating the legal personality of such persons.¹³⁰ The German Civil Code goes furthest. In case of a judicial declaration of death under the Code remarriage of the spouse of the person declared to be dead although actually living dissolves the first marriage.¹³¹ But there is no determination or impairment of the legal personality of the person declared to be dead. The effect

128. *In re Nerac*, 35 Cal. 392 (1868).

129. *Town of Baltimore v. Town of Chester*, 53 Vt. 315 (1881).

130. 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932) nos. 634-636.

131. German Civil Code, §§ 1330, 1350.

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is only as to the marriage relation and with respect to interests of substance.¹³²

There has been some discussion of "the legal status of dead men" and particularly of libel of a dead man as affecting the theory of legal personality.¹³³ As to criminal responsibility, the basis is the social interest in the general morals. As to allowing a civil action in such cases the interest secured is "not that of the dead but that of his living descendants."¹³⁴ In a curious American case where a libel upon George Washington was punished under a statute¹³⁵ the purpose of the statute was the social interest in the security of political institutions, the defamation of the father of his country being regarded as inimical to the stability of the social and political institutions of the land. As to the German cases cited in the note in the *Journal of Comparative Legislation*, the individual interests secured are obviously those of parents, children, or surviving spouse of the deceased.

There has been some discussion of the effect of legislation as to death by wrongful act in some jurisdictions where it is thought the statutes may extend legal per-

132. As to the German law, see Schuster, *Principles of German Civil Law* (1907) 29, 30.

133. Salmond, *Jurisprudence* (10 ed. 1947) § 113; Paton, *Jurisprudence* (2 ed. 1951) 317-318; Walton, *Libel Upon the Dead and the Bath Club Case* (1927) 9 *Journ. of Comparative Legislation*, 3d series, 1; Note, *Libel on the Dead* (1928) 10. id. 136.

134. Salmond, *Jurisprudence* (10 ed. 1947) 322.

135. *State v. Haffer*, 94 Wash. 136, 162 P. 45, L.R.A.1917C, 610 (1916).

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sonality beyond death.¹³⁶ Here the interests secured are obviously those of persons for whose benefit the action is allowed. The difficulties discussed proceed from the type of procedural thinking spoken of above in another connection. When we keep our eye upon the interests secured we have no difficulty in holding that the legal personality of a human being terminates at death.

As to juristic persons legal personality terminates on the legal dissolution of the organization. Here, again, certain theoretical difficulties may be conceived. For procedural purposes for the protection of those having interests in property of the juristic person the proceeding in form may postulate its continued existence. But the interests involved are purely those of persons having claims upon the assets. Also in American law when the charter of a corporation has expired it may happen that persons in good faith believing that the corporation is still in existence may continue to act as if still incorporated. In this case they are protected against any attack but that of public authorities in a quo warranto proceeding. But the *de facto* corporation means only that the interests of those proceeding in good faith are protected until the complete extinction of the corporation is effected.¹³⁷

136. Kocourek, *Jural Relations* (1927) 296; Paton, *Jurisprudence* (2 ed. 1951) 318-319.

137. Warren, *Corporate Advantages Without Incorporation* (1929) 683-688.

Chapter 26

Acts

§ 128. General Theory of Acts.

§ 129. Wrongful Acts.

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Chapter 26

Acts

Section 128



GENERAL THEORY OF ACTS.¹ 1. *Conception and definition.*² Law adjusts the relations and orders the conduct of legal units, i.e. persons. Persons may have relations

with other persons which require adjustment and may engage in conduct which affects other persons or affects society as a whole. Thus the relations to be adjusted or the conduct to be ordered may be between person and person. But the relations may also be with respect to things, that is objects, which may be corporeal or incorporeal, that is, material goods of existence, or claims to such goods or economically advantageous relations treated on the analogy of material objects. Likewise conduct may take the form of items which affect individual in-

1. 1 Austin, *Jurisprudence* (5 ed. 1885) lects. 19-21; Holland, *Jurisprudence* (13 ed. 1924) 107-125; Salmond, *Jurisprudence* (9 ed. 1937) 120-124, 133-144; Pollock, *First Book of Jurisprudence* (6 ed. 1929) 141-171; Markby, *Elements of Law* (6 ed. 1905) §§ 213-214; Paton, *Jurisprudence* (2 ed. 1951) §§ 65-67; Keeton, *Elementary Principles of Jurisprudence* (2 ed. 1949) 195-221; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 66-69.

2. Salmond, *Jurisprudence* (9 ed. 1937) § 128; Terry, *Leading Principles of Anglo-American Law* (1884) §§ 77-81; Kocourek, *Jural Relations* (1927) chap. 16; 1 Kohler, *Lehrbuch der bürgerlichen Rechts* (1905) § 216; 2 Binding, *Die Normen und ihre Uebertretung* (2 ed. 1914) §§ 60-66.

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terests of personality or in the domestic relations or of substance, and so create, alter, or divest rights (in the wider sense), or may infringe social interests and so come within the purview of the criminal law. These items of conduct are called acts. The subject matter of law, then, from this analytical standpoint, is persons, things, and acts. The Roman law took those topics up in that order. There are thought to be reasons in modern law for taking them up in the order persons, acts, things. As the order is at least chiefly a matter of convenience, I am following the Continental books on this point.

In legal understanding an act is an exertion of the will manifested externally.³ It implies a choice.⁴ A convenient distinction sets off acts, "voluntary muscular motions" from events, those occurrences which take place independently of human will.⁵ Only facts which can be referred to a human agent are acts. But the law may give legal effects to events. For example, the death from natural causes of an owner of an estate of inheritance in land had the effect in the common law of at once transferring the property to the heir.⁶

3. "An act is a manifestation of the will in the external world." Arndts, *Lehrbuch der Pandekten* (14 ed. 1889) § 58.

4. Holmes, *Common Law* (1881) 54.

5. Pollock, *First Book of Jurisprudence* (5 ed. 1929) 142-143; Amos, *Science of Law* (8 ed. 1896) 101; Keeton, *Elementary Principles of Jurisprudence* (2 ed. 1949) 195.

6. Pollock, *op. cit.* 143.

Acts are significant both as giving rise to or divesting rights, powers, liberties, and privileges, and creating and putting an end to duties and liabilities, and as demandable by those in whom rights, powers, liberties, and privileges inhere, and from those on whom duties and liabilities are imposed. But as creating or divesting rights in the wider sense they are referable to a broader conception of "facts." Bentham spoke of the facts to which the law attributes effects or results of creating or divesting rights in the wider sense, duties, and liabilities, as "events." He objected to the French terminology, in which they were called titles, but was willing to use the term title although preferring to say "dispositive events." He classified them as collative or investive and ablative or divestive.⁷ Austin rejected Bentham's objection to the term "title" and discussed Bentham's classification at some length.⁸ Hohfeld's term⁹ "operative facts" has come to be much used. Holmes, anticipating the threat theory of a law as developed by Kelsen, pointed out that a right was a consequence attached by law to a fact or facts defined by law.¹⁰

7. 3 Bentham, Works, Bowring, ed. 186-190, edited from Bentham's MSS and the French version by Dumont of *Vue générale d'un corps complet de législation* in 3 *Traité de Législation* (2 ed. 1820) 302-319.

8. 2 Jurisprudence (5 ed. 1885) 886-904.

9. Fundamental Legal Concepts as Applied in Judicial Reasoning (1920) 32.

10. The Common Law (1880) 214.

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Paton observes rightly that the progress of science is likely to force jurists to reconsider the theories on which their conception and analysis of an act are based.¹¹

2. *Elements.* There has been much discussion as to the elements of an act as understood in law. Holland sets forth three: (1) An exertion of the will, (2) an accompanying state of consciousness, (3) a manifestation of the will.¹² I should query as to the second. Is this an element in every act or is it a characterizing qualification accompanying some acts?

To use a common phrase, one "makes up his mind" to throw away his watch and throws it on the dump heap. The rule of law is that if one gives up possession of a chattel with the intention of giving up all right to it, there is an abandonment and his ownership is at an end. Are there two things here, act and intention, or is the intention part of the act? It is no answer to say that in practice the making up of his mind and the intention with which he left the watch on the dump heap will be inferred from his putting the watch there. He may show that it fell there out of his pocket without his knowledge. What we must ask is, may there be a legal act without any necessary qualifying intention? There certainly may be in case of trespass on land. One "makes up his mind" to walk across a strip of ground and does so with no notion

11. Text Book of Jurisprudence (2 ed. 1951) 243.

12. Holland, Elements of Jurisprudence (13 ed. 1924) 198.

that it is the private property of X and so with no intention of trespassing. None the less there is a trespass.

Salmond also finds three elements of an act: "(1) Its origin in some mental or bodily activity or passivity of the doer, (2) its circumstances, (3) its consequences."¹³ I should agree with Austin and Holmes that the chain of physical sequences that it sets in motion is no part of an act.¹⁴ Keeton, following Bentham,¹⁵ put six elements of an act at the foundation of legal liability: (1) The exertion of the will, (2) the consciousness with which the act was done, (3) the circumstances attending the act, (4) the consequences of the act, (5) the intent with which the act was done, (6) motive.¹⁶ But Bentham pointed out that the first was the act and he puts the rest as attending facts some of which at least must be taken into account in the theory of liability. Salmond, going on the idea that the term "act" must cover all that gives rise to liability, accepts three of Bentham's six elements. If, however, we are to include everything requisite to liability must we not include form? A promise meant to create obligation may fail to impose liability for want of form or consideration, which is in effect a form. If it is said that all acts do not require form the answer is that all acts do not require "circumstances." As Salmond says, "in theft the hour of the day is irrelevant, in burglary it is material," and he adds that only

13. Salmond, *Jurisprudence* (9 ed. 1937) § 128.

14. 1 Austin, *Jurisprudence* (5 ed. 1885) 419. "An act is always a voluntary muscular contraction and nothing else. The chain of physical consequences which it sets in motion or directs to the plaintiff's harm is no part of it." Holmes, *Common Law* (1881) 91. So also 1 American Law Institute, *Restatement of the Law of Torts* (1939): [The term is used] "to denote an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended."

15. Bentham, *Principles of Morals and Legislation*, Clarendon Press reprint (1876) 72.

16. Keeton, *Elementary Principles of Jurisprudence* (2 ed. 1949) 199.

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those which the law selects as material constitute parts of the act.¹⁷ Moreover, a growing category of liability without fault, which may be liability for events where there is no act, shows that act is not the sole basis of liability. Suppose lightning strikes the smokestack of a factory, bricks are knocked off and one strikes and injures an employee. Under the Workmen's Compensation Act the employer is liable for compensation. But there is no act. There are circumstances and consequences but there is nothing under the control of the will.

Kocourek admits but two of Bentham's six and Salmond's three elements, and holds that act is made up of the externally manifested exercise of the will and the consequences; that the harmful result is part of the act and that acts are "the legal conceptions of results."¹⁸ He says that such definitions as that "murder is the wrongful killing of a human being with malice aforethought" show that the consequence is in law part of the act.¹⁹ I should say that murder is not the act, but an act may have a consequence which the law pronounces murder. The act may be shooting, or stabbing, or poisoning, or beating with a club or a hammer. The consequences may be killing or maiming or wounding, and consequences and circumstances may make the result murder, manslaughter, mayhem, felonious assault, or self defense. There is no need of saying that the circumstances surrounding the outward exertion of the will are part of the act. It is true that the circumstances under which the will is exerted may make a difference in the legal consequences. But that only shows that legal consequences of an act may be determined by something outside of itself. It is the attitude of the law toward an act which is determined by the consequences. An oral promise is not a legal transaction if made upon no consideration. But

17. Salmond, *Jurisprudence* (9 ed. 1937) 505.

18. Kocourek, *Jural Relations* (1927) 263-270.

19. *Ibid.* 264.

does it follow that it is not an act? Speaking of Holmes' definition of an act, Kocourek says: "No one would think of saying that a contract, whether oral or written evidence of it is found, is created by a muscular contraction."²⁰ But it cannot be created without some sort of willed muscular contraction. The law would make the act a contract in view of intention and circumstances. But it is an act as a fact independent of them.

It is fair to say that Kocourek is writing about what he calls "jural acts,"²¹ i. e. what the Germans call *juristische Tatsachen*, not, however, about *Rechtsgeschäfte*, or as the French put it *actes juridiques*, which I call legal transactions, but about acts which have legal significance. But the legal significance is not part of the act. It is attached by law to the act on various grounds of which Bentham has given the fullest account. Certainly more than consequences may be what the law regards as material. Suppose A drives a car 70 miles an hour down the middle of a busy city street. He does not hit any one. No one can sue him. But he can be prosecuted for dangerous driving although there have been no consequences. Again, Kocourek says that if A puts an obstruction in the highway and the next day B runs into it and is hurt "in some mysterious way or by arbitrary assumption, a jural relation is thought of as arising following an interval long or short after the act was completed."²² He thinks there is no "jural act" until the man is hurt. But suppose A digs an excavation beside a public road and leaves it unprotected and with no lights at night. No one falls in, but there is an unreasonable risk of injury created. A week later A is indicted for a nuisance. Was not the act complete when the excavation was dug and left unguarded? Or were there two acts: (1) The act giving rise to a civil action when some one was injured, if at all,

20. Ibid. 269.

21. Ibid. 271.

22. Ibid. 270.

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and (2) the act prosecuted by indictment when the excavation was made and left unguarded? Certainly there can be no necessity here of thinking of more than one act. Kocourek finds a logical difficulty in separating act and relation which we are told cannot be done without destroying the connection between them. He considers that it is necessary to import a "conceptual quality" required for scientific reasoning in order to meet the exigencies of "the more logically refined and detailed process of juristic reasoning."²³ I must confess that I am unable to see why juristic reasoning requires us to make the putting of the obstruction in the street and the injury to the wayfarer in the one category of act in order to establish a connection between them.

Both Salmond and Kocourek are thinking of penal liability or responsibility.²⁴ Kocourek is reaching back from the result. The pandectists reach forward from the will.²⁵ Although the pandectists in general put altogether too much upon the will as the central point in jurisprudence, we have not reached a point in psychology where we can wholly dispense with that conception.

As above suggested, acts may be of legal significance (juristic acts otherwise legal acts, or as Kocourek says, jural acts) or may be legally not significant. As to those which are juristically significant they have been said to be either permitted acts, or acts contrary to law otherwise called forbidden acts. But should we not say (1) acts permitted as exercising of liberties or acts within the limits of privileges, (2) acts given effect by law as

23. Ibid. 272.

24. Salmond, *Jurisprudence* (9 ed. 1937) 305.

25. Arndts, *Lehrbuch der Pandekten* (14 ed. 1889) § 58; 1 Windscheid, *Pandekten* (9 ed. 1906) § 101.

legal transactions, and (3) acts contrary to law? That is, acts may have legal consequences to the extent of legal recognition when within the scope of liberties or privileges, or because they were done with the intention of bringing about certain consequences which the law recognizes and the law gives effect to the intention, or because they infringe interests (social, public, or individual) which are recognized and secured by the legal order. In the latter case they may involve responsibility for breach of an absolute duty,²⁶ or liability for breach of a duty correlative to some right, or, because they are carried out so as to depart from the legal standard of conduct under the circumstances, may involve liability for injury to some secured individual interest. Again, an act may be either positive or negative, i.e. acts in the narrower sense or negligent omission. But the most important classification of juristic acts is into legal transactions²⁷ and wrongful acts. Salmond distinguishes between internal and external acts.²⁸ Austin objected to this distinction.²⁹ It was made by Bentham.³⁰ As Austin says the so-called internal act is properly spoken of as a volition or determination of the will.

26. *Ante*, § 123.

27. *Rechtsgeschäfte*. See *post*, § 129.

28. Jurisprudence (9 ed. 1937) 504.

29. 1 Jurisprudence (5 ed. 1885) 420-421.

30. Principles of Morals and Legislation, Clarendon Press reprint (1876) 73.

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3. *Representation*.³¹ Representation in acts has been spoken of already under powers,³² and will require further consideration in connection with wrongful acts³³ and duties of reparation.³⁴ Historically juristic theory as to representation in legal transactions and as to liability for what is done by or through others developed out of institutions of kin-organized society and was given form by ideas of the role of the will—of the will as the central point in the science of law—and of fault, misapplication of the will, as the basis of legal liability. The Roman doctrine that there could be representation in act but not in will³⁵ long stood in the way of a law of agency on the Continent. A fictitious identification of the persons of principal and agent seemed to be required and long confused the subject in Anglo-American law. The jural postulates on which we found the law of agency, of master and servant, and of employers' liability today afford a broader foundation than an idea of representation in acts. Whether we are considering contractual liability

31. Seavey, *The Rationale of Agency*, 29 *Yale Law Journ.* 859 (1920), *Studies in Agency*, (1949) 65-108; id. *Agency Powers*, 1 *Univ. of Oklahoma Law Rev.* 1 (1948), *Studies in Agency*, 181-202 (1949); Paton, *Text Book of Jurisprudence* (2 ed. 1951) § 70; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 73-74; Capitant, *Introduction a l'étude du droit civil* (4 ed. 1923) 384-392; 1 Planiol, *Traité élémentaire de droit civil* (2 ed. 1932) nos. 298-300; 1 Demogüe, *Traité des obligations en général* (1923); Baty, *Vicarious Liability* (1916).

32. *Supra*, § 120.

33. *Infra*, § 130.

34. *Post*, chap. 32.

35. Buckland, *Text-Book of Roman Law* (2 ed. 1932) 533.

for transactions of agents or delictal liability for wrongs or negligent imposing of risk by servants or employees, we get down to postulates of life in a civilized society that men must be able to assume that others who employ agencies or instrumentalities or maintain conditions which have a natural tendency to get out of hand and cross the boundaries of their proper use will restrain them and keep them within their proper bounds.³⁶

Representation in acts, then, is a way of putting the result of a power conferred by a principal upon an agent whereby the latter may bind the former either in a simple legal transaction or in a specified type of legal transaction or in transactions generally, or of a power given by law directly whereby one may be made liable for acts of an agent or an employee. As said above in discussing powers, the powers given by law directly are referable to the social interest in the general security in the case of employer and employee and to the social interest in the security of transactions in the case of apparent authority of an agent. The books speak of representation in legal transactions, in wrongful acts, and in litigation. One is held in a legal transaction by virtue and to the extent of a power he has conferred or sometimes beyond that by virtue of a further power conferred by law to maintain the security of transactions. He is burdened with liability because of a power which the law has bestowed upon

36. See Pound, *Introduction to the Philosophy of Law* (2 ed. 1954) 89 ff.

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an agent or employee in order to maintain the general security. But there are other operative facts creating liability besides powers conferred by law.³⁷ Also a person because of status or incapacity may be held for what others are given a power by law of doing for his protection.³⁸ Likewise one may have another standing for him in the conduct of a case in litigation because and when the law has so provided for his protection.³⁹ The cases of representation for protection are referable to the social interest in protection of dependents and defectives and the social interest in the individual life.

4. *Legal transactions.*⁴⁰ Acts as operative facts (*juristische Tatsachen*), that is, as having legal consequences, are of two kinds. They may have legal consequences because they interfere with interests (social, public, or individual) recognized and secured by law, and so involve responsibility for breach of an absolute duty or liability for breach of a duty correlative to some right. Or they may have legal consequences because such was the intention of the person or persons who performed

37. See *post*, § 130.

38. See *supra*, § 125.

39. See *post*, chap. 32.

40. Salmond, *Jurisprudence* (1 ed. 1902) §§ 121-123; Terry, *Leading Principles of Anglo-American Law* (1884) §§ 172-180; 1 Kohler, *Lehrbuch des deutschen bürgerlichen Rechts* (1905) §§ 217-225; Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 294-299; 1 Demogue, *Traité des obligations en général* (1923, 1933) nos. 156-158 *bis*, 2 *id.* nos. 539-541; 1 Planiol, *Traité élémentaire de droit civil* (12 ed. 1932); Ferson, *The Rational Basis of Contracts and Related Problems in Legal Analysis* (1949).

them and the law recognizes and gives effect to that intention. Such acts are here called legal transactions. They are performed in order to create rights, powers, or privileges, and when done by competent persons and in the prescribed manner, the law recognizes them and carries out the intent.

For this latter kind the French term is *acte juridique*. The German says *Rechtsgeschäft*. Pollock proposed the term act-in-the-law.⁴¹ Holland objected to this term⁴² on two grounds: That it "could not be disentangled from its" conveyancing associations and that act in law had a special use in the common law, as distinguished from "act of the party," going back to Hale.⁴³ Holland suggests "juristic act"⁴⁴ which does not translate either *acte juridique* or *Rechtsgeschäft*, the terms generally used on the Continent. Jenks used the term "legal act."⁴⁵ Recent English writers follow Pollock.⁴⁶ Holland noted the fundamental idea of *Rechtsgeschäft* had "hardly yet been naturalized" in England so that it was not to be wondered at that there was no settled English equivalent.⁴⁷ Since 1904⁴⁸ I have used the term "legal

41. First Book of Jurisprudence (1878) 135.

42. Elements of Jurisprudence (13 ed. 1924) 118, n. 2. He first used the term "juristic acts" in 1 ed. (1880) 73.

43. Analysis of the Law (1713) § xxvii.

44. Elements of Jurisprudence (13 ed. 1924) 117-118.

45. Digest of English Law (1905) Book I, Section III.

46. Salmond, Jurisprudence (1 ed. 1902) § 122; Keeton, Elementary Principles of Jurisprudence (2 ed. 1949) 187; Paton says "juristic acts" like Holland, but adds that some writers call them "acts in the law." Jurisprudence (2 ed. 1951) 247-248.

47. Elements of Jurisprudence (1924) 135 n. 1.

48. Readings in the History and System of the Common Law (1904), chap. X, (3 ed. 1927) 315.

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transaction" getting the hint from the New York Code of Civil Procedure.⁴⁹ The English word "transaction" does well here but may lead to misunderstanding on the Continent. The Roman law used *transactio* for agreement of compromise of disputes.⁵⁰ The French Civil Code⁵¹ uses *transaction* in the same sense, and such is the Continental usage generally. The use of the English word in the New York Code of Civil Procedure for something that is done, so that legal transaction is something done legally, that is, done according to law, seems to give a term as near as may be to *Rechtsgeschäft*. Others have so used it.⁵²

(a) *Conception*.⁵³ In the last century, in the era of the will jurisprudence, it was said that an individual willed a possible and permissible legal result and the law, in order to secure the individual free will, gave to the expression of that will the desired result. In this way of thinking the significant element in a legal transaction was the will: The will to achieve a possible and legally permissible result, to which, when properly declared by a person competent to the act, the law attributed the in-

49. "The plaintiff may unite in the complaint several causes of action . . . when they all arise out of . . . the same transaction or transactions connected with the same subject of action." N.Y. Code of Civ.Proc. (1849) § 167.

50. Dig. 2, 15 (*de transactionibus*).

51. Code civil, § 2044.

52. Williams, *The Swiss Civil Code* (1925) 3-4 (note 3 to § 12) and see vocabulary, s.v. "legal transaction", 262, s.v. "*acte juridique*," 271; Ferson, *The Rational Basis of Contracts and Related Problems in Legal Analysis* (1949).

53. Karlowa, *Das Rechtsgeschäft* (1877); 1 Windscheid, *Pandekten* (9 ed. 1906) § 69; Enneccerus, *Das Rechtsgeschäft* (1889).

tended result.⁵⁴ Today, however, we recognize that there is more to take into account than the will of the person who acts in making a declaration of the will to bring about a legal result. Undoubtedly we must give that will consideration, particularly where fraud or mistake or force are involved. But we must balance his claim to or expectation of free self-assertion with the reasonable expectations of those to whom his declaration of will is addressed or whom he expects to be affected thereby. The social interest in the individual life—in free self-assertion by individuals in their economic life—must be kept in balance with the social interest in the security of transactions—the reasonable expectations of those to whom these declarations of will are addressed or who are intended to be brought into new or changed economic relations.⁵⁵

Before Kant turned the thinking of jurists toward the will, Leibnitz wrote of *dispositiones iure efficientes*,⁵⁶ a significant way of putting it when *ius* was undifferentiated right and law and men were thinking of moral as therefore legal efficacy. We cannot ignore the will of the actor in a legal transaction even if we think of the will to declare rather than of an intention to achieve at all events the exact legal result desired. Thus we may well adopt Windscheid's formula: "A private declaration of

54. See the long discussion in Arndts, *Pandekten* (8 ed. 1883) § 65 n. 1.

55. See *post*, § 138.

56. *Codex iuris gentium diplomaticus* (1693) preface.

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will directed to the originating, terminating and altering of rights" (in the wider sense).⁵⁷ This was followed by Holland⁵⁸ and later writers in England.⁵⁹

Importance of the idea of a legal transaction is brought out by the confusion in Anglo-American law as to waiver.⁶⁰ Waiver was said to be the intentional relinquishment of a known right. But it was said that except in case of forfeitures it required consideration or the elements of estoppel.⁶¹ Accordingly Ewart argued there was unreality in treating such things as waiver. The cases could all be referred to election, estoppel, contract or release. The basis of giving effect to the relinquishment might be prevention of unjust enrichment, or enforcement of what amounts to a binding promise upon consideration, or requirement of good faith in dealings with others in the general intercourse of society.⁶² It was not giving effect to the declared will of one who relinquished his right. Yet it has been said generally that waiver of a forfeiture did not require consideration or estoppel.⁶³ This might be referred to equity's abhorrence of forfeitures as taken over by law. Ewart seeks to avoid it by a classification of forfeiture under which the so-called waivers can

57. 1 Windscheid, Pandekten (9 ed. 1906) § 69. It was first promulgated in slightly different form in 1 ed. 1862.

58. Elements of Jurisprudence (13 ed. 1924) 118.

59. Salmond, Jurisprudence (1 ed. 1902) § 132; Paton, Jurisprudence (2 ed. 1951) 247-248.

60. Bowers, Waiver (1914); Ewart, Waiver Distributed (1917).

61. Schwartz v. Wilmer, 90 Md. 136, 44 A. 1059 (1899); Ripley v. Aetna Life Ins. Co., 30 N.Y. 136, 164 (1864); Marfield v. Cincinnati, D. & T. Traction Co., 111 Ohio St. 139, 144 N.E. 689, 40 A.L.R. 357 (1924); Dougherty v. Thomas, 313 Pa. 287, 169 A. 219 (1933); Atlantic Coast Line R. Co. v. Bryan, 109 Va. 523, 65 S.E. 30 (1909).

62. Ewart, Waiver Distributed (1917) chap. 2.

63. Bowers, Waiver (1914) §§ 62-64.

be referred to election.⁶⁴ But he has to make a vigorous attack upon the well-settled line of cases as to forfeitures for breach of condition in policies of insurance.⁶⁵ Also it has long been settled that waiver of presentment for payment, protest and notice does not require consideration or estoppel.⁶⁶ This seems to have been taken over from the law merchant, which did not know of the common-law requirement of consideration.⁶⁷ In the three cases, then, waiver of provisions for defeating insurance, of forfeiture and of presentment, protest and notice in the law of bills and notes, waiver has become a legal transaction giving effect to the declared will of the party acting. Moreover, the Supreme Court of the United States has held that "income and profits tax waivers," waiving the statutory limitation upon assessment and collection of income or excess profits taxes, are not contracts protected against subsequent legislation.⁶⁸ Likewise waiver of constitutional rights such as right to jury trial,⁶⁹ right to be present during trial and at rendition of the verdict,⁷⁰ and not to be required to testify against oneself,⁷¹ cannot be referred to any tra-

64. Waiver Distributed (1917) chap. 4.

65. *Ibid.* chap. 9.

66. Bowers, Waiver (1914) chap. 3; *Barclay v. Weaver*, 19 Pa. 396 (1852); *Burgettstown Nat. Bank v. Nill*, 213 Pa. 456, 63 A. 186, 3 L.R.A., N.S., 1079 (1906).

67. At least Story cited Pothier in connection with waiver. *Bills of Exchange* (1843) § 280.

68. *Florsheim Bros. Co. v. United States*, 280 U.S. 453, 465-467, 50 S.Ct. 215, 219, 74 L.Ed. 600 (1930). See also *Big Four Oil & Gas Co. v. Heiner*, 57 F.2d 29, 30 (C.C.A.3d, 1932).

69. *State v. Worden*, 46 Conn. 349, 366 (1878); *Rawlings v. State*, 2 Md. 201 (1852); *In re Staff*, 63 Wis. 285, 23 N.W. 587 (1885), overruling *State v. Lockwood*, 43 Wis. 403 (1877).

70. 1 Bishop, *New Criminal Procedure* (1895-96) § 266.

71. *Spies v. People*, 122 Ill. 1, 12 N.E. 865, 17 N.E. 898 (1886); *People v. Tice*, 131 N.Y. 651, 30 N.E. 494, 15 L.R.A. 669 (1892).

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ditional common-law category. They must stand on their own basis as legal transactions. Where waiver in such cases is denied it is not for defect of consideration or estoppel nor for unjust enrichment by retracting an election, but because of a weighing of social policies.⁷²

It is said that legal transactions may be either unilateral or bilateral: i. e. they may be such that the will of only one is operative, or such that two or more wills are operative.⁷³ Examples of unilateral legal transactions are a devise or legacy, a declaration of trust, exercise of a power of appointment. The most important bilateral legal transaction is contract. Yet it should be noted that a unilateral contract may be a bilateral act, as it is a species of agreement which involves an act by each party thereto. Hence the distinction is only significant for the purpose of setting off the most important type of legal transaction, namely contract. The term contract was long used for legal transactions generally. For example, Article I, Section 1 of the Constitution of the United States, forbidding state enactment of legislation "impairing the obligation of contracts," was held to cover state grants of land⁷⁴ and charters of corporations.⁷⁵ But in the accepted terminology of today the term "contract" is given a narrower meaning and does not even include all agreements.⁷⁶

72. Cooley, *Constitutional Limitations* (6 ed. 1890) 484-486; Summeralls v. State, 37 Fla. 162, 20 So.2d 242 (1896).

73. Salmond, *Jurisprudence* (1 ed. 1902) 372-375.

74. *Fletcher v. Peck*, 6 Cranch (U.S.) 87, 3 L.Ed. 162 (1810).

75. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U.S.) 518, 4 L.Ed. 629 (1819). "The doctrine of this case . . . has been reaffirmed and applied so often as to have been firmly established as a canon of American jurisprudence." *Brown, J. in Pearsall v. Great Northern Ry.*, 161 U.S. 646, 660, 16 S.Ct. 705, 708, 40 L.Ed. 838 (1896).

76. See *post*, chap. 31, § 138.

(b) *Elements*. The elements of a legal transaction are (1) will, (2) expression of the will, (3) capacity, and (4) a possible and legally permissible result.

Direction of the will toward a purposed legal result is of the very essence of a legal transaction. But this idea was carried out too far in the nineteenth century. A will-theory came to be put at the very basis of the science of law. Everything was to be fitted to the externally manifested individual free will. This was manifest especially in connection with interferences with or prevention of the free functioning of the will of the actor, where we must temper the extreme position taken by Savigny and his followers.⁷⁷ But it remains that we have to do with operative facts intended to produce legal consequences.

Expression of the will, declaration of intention to bring about a legal result, raises many problems. One, which has been discussed since the classical jurists of the third century,⁷⁸ is effect of remaining silent when some proposition is addressed to one.⁷⁹ A series of questions arise out of the controversy as between the will theory and the declaration theory.⁸⁰ Are we to

77. See *infra*, (a) and *post*, § 138.

78. Paul in Dig. 50, 17, 1.

79. 1 Williston, *Contracts* (2 ed. 1926) § 91; Stössel, *Die stillschweigende Willenserklärung nach römischem Rechte* (1859); Ehrlich, *Die stillschweigende Willenserklärung* (1893); 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 105, 108 (1930).

80. Holland, *Jurisprudence* (13 ed. 1924) 262-268; 1 Williston, *Contracts* (2 ed. 1920) §§ 21, 94; Saleilles, *De la déclaration de volonté* (1901) 1-11, 199-233; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 90, 102, 105; 1 Demogue, *Traité des obligations en général* (1923, 1933) nos.

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search for and give effect to the actual individual intent where words are used in their usual meaning as reasonably understood by the person to whom the declaration was addressed? The will theory, carried to the extreme by text writers, led some courts to insist upon "genuineness of consent."⁸¹ But the view generally followed in the United States was well put by Judge Learned Hand: "A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held. . . . Of course if it appear by other words or acts of the parties that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail; but only by virtue of the other words, and not because of their unexpressed intent."⁸² Another sort of case often discussed is that of words spoken in jest taken seriously by the person to whom addressed.⁸³ Still another is mistaken transmission of a message by an intermediary, not an agent so as to be able to bind by his mistake the per-

156-158 bis, 2 id. nos. 539-541; Henle, *Vorstellungstheorie und Willenstheorie* (1910). See *post*, § 138.

81. Anson, *Principles of the English Law of Contract* (10 ed. 1903) 140; *Hartford & N. H. R. Co. v. Jackson*, 24 Conn. 514, 517 (1856); *Rowland v. New York, N. H. & H. R. Co.*, 61 Conn. 103, 105, 23 A. 755 (1891). The case first cited relied on 1 Parsons, *Contracts* (1853) 399: "They must assent to the same thing in the same sense."

82. *Hotchkiss v. National City Bank of N. Y.*, 200 F. 287, 293 (D.C.N.Y. 1911). In cases where the word used to designate an object was reasonably descriptive, unknown to the parties, of each of two distinct objects and was in good faith reasonably taken by each to mean a different one from that meant by the other, as in *Raffles v. Wichelhaus*, 2 H. & C. 906 (1864), there is no transaction on either theory.

83. *Plate v. Durst*, 42 W.Va. 63, 24 S.E. 580, 32 L.R.A. 404 (1896). But see *Keller v. Holderman*, 11 Mich. 248 (1863); *Higgins v. Lessig*, 49 Ill.App. 459 (1893); *Nyulasy v. Rowan*, 17 Vict.L.R. 663 (1891).

son sending the message. Here English and Scottish cases have held there is no transaction.⁸⁴ But if it was reasonable to take the message as transmitted to mean what it meant on its face, there is strong American authority holding it a binding declaration of will.⁸⁵ This question has been debated also in France.⁸⁶ Jhering suggested dealing with cases of this latter sort on a theory of *culpa in contrahendo*: Negligent subjection of the party to whom the declaration of intention was addressed to an unreasonable risk of loss.⁸⁷ Such cases as the one put by Stamm-ler of the Italian dealer in pets who, wishing to order one or two monkeys, wrote on a post card "1 o 2 simie" meaning *un o due simie*,⁸⁸ give point to Jhering's proposition. The difference between the declaration theory and the will theory supplemented by *culpa in contrahendo* may be of more importance in procedure than in practical result. On the whole, it seems better to say that the decisive point is the declaration as reasonably understood. But mistake or fraud may avoid it. This accords with the postulate of making good reasonable expectations reasonably created by promises or other conduct. Also it is better to put the matter straightforwardly in this way than to say that the will of the party is decisive but it is presumed to have been what it reasonably appeared to be from the declaration.⁸⁹

84. *Henkle v. Pape*, L.R. 6 Ex. 7 (1870); *Verdin Bros. v. Robertson*, 10 Ct.Sess.Cas. 3d Ser. 35 (1871).

85. *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S.E. 815 (1902); *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 A. 495 (1887); *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481, 18 N.W. 291 (1884); *Howley v. Whipple*, 48 N.H. 487 (1869).

86. 3 Lyon-Caen et Renault, *Traité de droit commercial* (5 ed. 1921) no. 23.

87. *Das Schuldmoment im römischen Privatrecht* (1867) 38.

88. *Pandektenübungen* (2 ed. 1896) 146-147.

89. This is well put in Paton, *Jurisprudence* (2 ed. 1951) 356-357. See also Holland, *Jurisprudence* (13 ed. 1924) 264-268.

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It remains to note that the declaration need not be in speech or writing. It may be an indirect expression of will. Indirect expression by silence has been spoken of above. It may take the form of acts which have immediately an independent purpose but presuppose the transaction in question. The inference of a declaration of will may be logically necessary as in the familiar case where one accepts interest for a time ahead on a debt already due.⁹⁰ But it is enough if the inference derives from ordinary experience and everyday understanding, as in case of a creditor giving back to the debtor the evidence of the debt.⁹¹

Capacity for legal transactions has been considered fully in another connection.⁹²

As to the purposed result, the civilian analysis of a legal transaction calls for a "possible and permissible juristic result."⁹³ If the result purposed is physically impossible yet the party making the declaration may intentionally take the risk of possibility. Also if it is physically possible but beyond his power of achievement, he may intentionally take the risk. In case of supervening impossibility a question arises as to "frustration" in which an idea of a task of the law to relieve individuals from burdens to which they are unequal has been affecting the balance of policies or social interests which had given form to the doctrine of legal transactions in the nineteenth century. It will be considered fully in another place.⁹⁴

90. *Crosby v. Wyatt*, 10 N.H. 318, 323 (1839).

91. *Slade v. Mutrie*, 156 Mass. 19, 30 N.E. 168 (1892); *Larkin v. Hardenbrook*, 90 N.Y. 333 (1882).

92. *Ante*, § 125.

93. Baron, *Pandekten* (1890) § 48.

94. *Post*, § 138.

(c) *Form*.⁹⁵ Requirements of form in legal transactions are due primarily to the need of assurance of the existence of operative facts.

Before the development of rational modes of trial as means of assured findings of the facts to which legal precepts were to be applied, the formal transaction in a rigidly prescribed public ceremony was an obvious expedient. Thus the Roman Twelve Tables (B.C. 450) provided: *Cum nexum faciet mancipiumque uti lingua nuncupassit ita ius esto*—"When he makes *nexum* or *mancipium*, as he declares with his tongue so be the right-and-law." What one who performed the prescribed customary ceremony, in the presence of five witnesses and another who held a bronze coin and balance, declared formally was law for the parties.⁹⁶ At Athens a law of Pittacus required a contract to be

95. Holland, *Elements of Jurisprudence* (13 ed. 1924) 123, 279-283; Pollock, *First Book of Jurisprudence* (6 ed. 1925); Salmond, *Jurisprudence* (1 ed. 1902) 31-32; 2 Austin, *Jurisprudence* (5 ed. 1885) 907-909; 6 Bentham, *Works* (Bowring ed. 1843) 64-86, 508-585; Llewellyn, *What Price Contract*, 40 *Yale Law Journ.* 704, 738 (1931); 2 Savigny, *Obligationen Recht* (1853) § 74; 3 *id.* *System des heutigen römischen Rechts* (1840) § 130; 1 Windscheid, *Pandekten* (9 ed. 1906) § 72; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) §§ 235-237; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 95-97, 104-121; French Civil Code, arts. 931, 1250, 1394, 2044, 2074, 2075, 2117; 3 Gény, *Science et technique en droit privé positif* (1921) §§ 202-206; Demogue, *Les Notions fondamentales du droit privé* (1911) 83-87; 1 *id.* *Traité des obligations en général* (1923) nos. 191-212; German Civil Code (1896) §§ 125-129; Swiss Code of Obligations (1901) art. 11; Huber, *Formen im schweizerischen Privatrecht*, Heft 58 *Gmür*, *Abhandlungen zum schweizerischen Recht* (1914) 79-126; Chinese Civil Code, art. 73; Civil Code of Soviet Russia, art. 29; American Law Institute, *Restatement of the Law of Contracts* (1932) §§ 7-10, 95-110, 178.

As to formalism, see Maine, *Early Law and Custom* (1883) 26; 2 Vinogradoff, *Historical Jurisprudence* (1928) 232-233. As to the role of forms in the development of law and insistence upon them in the stage of the strict law, see *ante*, § 2. As to forms in the history of securing interests in promised advantages, see *ante* § 84.

96. Tab. vi, § 1, 1 Bruns, *Fontes Iuris Romani Antiqui* (7 ed. 1909) 251.

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made before the magistrate.⁹⁷ In the Middle Ages an oath on relics was a guarantee of the transaction.⁹⁸ At common law trial by charter and trial by record,⁹⁹ remnants of archaic modes of trial, could both meet the demand for guarantee of the reality of the declaration of will and meet the requirement of proof of the pact.

In the maturity of law forms lost the importance they had in the strict law. Historical forms held on to some extent and to some extent affected forms required by modern rules. This was true especially in conveyance of interests in land, informal contracts and in transactions of the law merchant.¹⁰⁰

Law today seeks in general so far as possible to give effect to the intention of the parties to a transaction to bring about a possible and legally permissible result. But there is need of assuring sufficient manifestation of that intention in cases of altering existing rights and making dispositions for the future. Hence in all systems

97. Diodorus, xii, 21.

98. Lea, *Superstition and Force* (4 ed. 1892) 29.

99. 3 Blackstone, *Commentaries on the Laws of England* (1767) 330-331.

100. A disappearing remnant is the requirement of the corporate seal to authenticate all transactions of a corporation. The common seal was said to be "the hand and mouth" of the corporation. Counsel *arguendo* in *Rex v. Bigg*, 3 P.Wms. 419, 423 (1717); *Tindall, C. J. in Gibson v. East India Co.*, 5 Bing. N.C. 262, 269 (1839). But exceptions grew up as early as *Panel v. Moor*, Plowden 91 (1553). The inconvenience in requiring use of the seal in everyday transactions of a bank or a trading company and in matters of trivial importance or urgent necessity in corporations generally led to substantial giving up of the common-law rule. *Bank of Columbia v. Patterson*, 7 Cranch (U.S.) 299, 305-306, 3 L.Ed. 351 (1813); *Fleckner v. Bank of the United States*, 8 Wheat. (U.S.) 338, 357-359, 5 L.Ed. 631 (1823).

of law there are requirements of specified forms of the declaration of intention. Austin^{100a} followed by Holland¹⁰¹ suggests also, in case of gifts and of suretyships, a need of preventing rash transactions by imposing form insuring deliberation. Moreover, to some extent public interests, e.g. securing of the public revenue, and the social interest in the general security may call for requirements of form or of recording in case of transactions of corporations and of transactions with respect to titles to property.¹⁰² Likewise forms may guard against fraud and false testimony and errors of weighing evidence of oral declarations of intention in cases of transactions likely to be hotly contested. Salmond suggests also that forms may be a means of excluding errors of judgment in the administration of justice and cites Bacon's version of Aristotle's proposition that that law is best that leaves least to the choice of the judge.¹⁰³ But on the other hand, he adds, vices of rigidity and formalism require the law to exercise a "sound judgment as to the relative importance of the matters that come within its cognizance."¹⁰⁴ Fuller^{104a} considers form has three functions, evidentiary, cautionary, and channeling. The first two are those

100a. 2 *Jurisprudence* (5 ed. 1885) 987.

101. *Elements of Jurisprudence* (13 ed. 1923) 279-280.

102. Pollock, *First Book of Jurisprudence* (6 ed. 1929) 156.

103. Bacon, *De Augmentis*, 4, aph. 46; Aristotle, *Rhet.* 1, 1, 8.

104. Salmond, *Jurisprudence* (1 ed. 1902) 28, 31-32.

104a. *Construction and Form*, 41 *Columbia Law Rev.* (1911) 799

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set forth by Austin and Holland. The third was in part suggested by Jhering—to fix definite forms for transactions which the law will assuredly uphold.^{104b} Fuller adds a function of offering a legal framework into which a party may fit his actions, or, in other words, to offer channels for legally effective expression of intention. But beyond the two functions set forth by Austin does this, for modern law, add any reason for compulsory forms?

In Anglo-American law required forms may be writing signed by the party sought to be charged, a disappearing form of private seal coming down from a time when only the clergy could write, formal deeds of conveyance at common law “sealed, signed and delivered,” formal contracts at common law signed, sealed and delivered, writing attested by witnesses, writing acknowledged before a magistrate or a notary public,¹⁰⁵ or formal acknowledgment of obligation in open court.¹⁰⁶ In France it may be acknowledgment before a public official, judge or notary.¹⁰⁷ In German law it may be authentication before a judge

104b. 2 Jhering, *Geist des römischen Rechts* (8 ed. 1923) 494.

105. Especially as a guarantee of freedom of will where subjection to coercion or unfair pressure are likely. At common law in conveyance of land by fine a married woman was privately examined by the judges or commissioners “whether she does so willingly and freely or by compulsion of her husband.” 2 Blackstone, *Commentaries on the Laws of England* (1766) 351. Similar requirements are general in American legislation as to releases of homestead by married women. Thompson, *Homestead and Exemption Laws* (1878) § 532; 2 Devlin, *Deeds* (2 ed. 1897) §§ 551-611.

106. *Recognizances at Common Law*, 2 Blackstone, *Commentaries on the Laws of England* (1766) 341-392.

107. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 114.

or notary of a signed written document, or simultaneous declarations of the parties or their agents before a registrar.¹⁰⁸

As to the different transactions in which form is required, in Anglo-American law the Statute of Frauds,¹⁰⁹ the chief provisions of which have been reenacted in substantially all English-speaking jurisdictions,¹¹⁰ provided that no action should be brought to charge an executor or administrator upon a special promise to answer damages out of his own estate, or to charge a defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands or any interest in or concerning them; nor upon any agreement not to be performed within one year, unless the agreement upon which the action was brought or some memorandum or note of it should be in writing signed by the party sought to be charged or some person duly authorized by him. It also provided that declarations or creations of trusts of land should be proved by writing signed by the party entitled to declare the trust or be wholly void.¹¹¹ Also transactions of the law merchant, bills of exchange, drafts, checks, certificates of deposit, and promissory notes required form and forms are prescribed by modern legislation.¹¹² Recent legislation has added bank credits,¹¹³ bills of lading¹¹⁴ and warehouse re-

108. Schuster, *German Civil Law* (1907) §§ 97, 327. See also *Swiss Civil Code*, arts. 963-966.

109. 29 Car. 2, c. 3 (1677).

110. See also American Law Institute and National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code* (1952) § 2-107.

111. *Statute of Frauds*, § 4.

112. *Uniform Negotiable Instruments Act* (1895) § 1; *Uniform Commercial Code* (1952) §§ 3-104 to 3-112.

113. *Uniform Commercial Code* (1952) § 5-104.

114. *Uniform Bills of Lading Act* (1909) §§ 2-3; see *Uniform Commercial Code* (1952) § 2-323.

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ceipts.¹¹⁵ The Uniform Commercial Code drafted by the American Law Institute and National Conference of Commissioners on Uniform State Laws calls for a writing also in case of modification of a signed agreement,¹¹⁶ "firm" (i. e. irrevocable) offers,¹¹⁷ contracts for sale of securities,¹¹⁸ agreements creating a security interest,¹¹⁹ financing statements,¹²⁰ and bulk transfer of a business or the major part of a stock in trade.¹²¹ It is becoming common for legislation to require recording or registration of formal instruments or filing of formal certificates.¹²²

In French law transactions requiring formal authentication (*contrats solennels*) are: Promise of gift,¹²³ contract of marriage,¹²⁴ and mortgage of an immovable.¹²⁵

Transfer of title to land has always required form.¹²⁶ Recording of conveyances of land ¹²⁷ and recording or registering

115. Uniform Warehouse Receipts Act (1906) § 2. See Uniform Commercial Code (1952) § 7-202.

116. § 2-204.

117. Id. § 2-209.

118. Id. § 8-319.

119. Id. §§ 9-204, 5-205.

120. Id. § 9-403.

121. Id. § 10-102.

122. Transfer of title to motor vehicles, 7 Blashfield, *Cyclopedia of Automobile Law and Practice* (Permanent ed. 1935) §§ 4251-4271; Conditional sales of chattels to be affixed to the realty, Uniform Conditional Sales Act (1918) §§ 5, 10, 11; Uniform Commercial Code, § 2-107; agreement of limited partnership, Uniform Limited Partnership Act (1916) § 2.

123. French Civil Code, art. 931.

124. Id. Art. 1394.

125. Id. Art. 2127.

126. As to the common law, see 2 Blackstone, *Commentaries on the Laws of England* (1766) 293-308, 310-316. As to present day English conveyancing, see Burnett, *Elements of Conveyancing* (1937) chaps. 10, 11. For the United States, see Casner and Leach, *Cases and Text on Property* (1950) chap. 27.

127. Casner and Leach, *Cases and Text on Property* (1950) chap. 29.

chattel mortgages ¹²⁸ became universal in the United States, but registration of titles and transfer by means of the certificate of registration has gained ground throughout the world.¹²⁹ Also there are everywhere special forms prescribed for testamentary dispositions.¹³⁰

It will be seen that the general complexity of affairs and continually increasing economic development have had a result of greatly increasing formal requirements and extending them to a great variety of transactions, where the social interest in the security of transactions has become more and more significant. More than this, however, the rise of the service state and economic conditions which have led increasingly to inequalities of bargaining power have affected the position of the legal transaction in the system of law. In the nineteenth century the free will was treated by jurists as a central idea. In 1896, Sir Frederick Pollock was concerned whether increasing legislative imposition of form upon legal transactions involved a tendency to impose restraints upon the individual will and saw in it, as I should put the matter, a comparative valuing of the social interest in the individual life (in the form of individual self-asser-

128. *Ibid.* 185-186.

129. *Ibid.* chap. 31; Potter, *Principles of Land Law under the Land Registration Act of 1925* (1941) chap. 1; Schuster, *German Civil Law* (1907) 317-321. In Germany there may be transfer by agreement before an official. *Ibid.* § 327.

130. *Wills Act*, 1 Vict. c. 26, 15 & 16 Vict. c. 24, followed generally by legislation in the common-law world; 5 Planiol et Ripert *Traité pratique de droit civil français*, (1933) nos. 531-583; Schuster, *Principles of the German Civil Law* (1907) §§ 487-489.

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tion)¹³¹ and the social interest in the general security (in the form of the security of transactions).¹³² He felt that there was no purpose of limiting free exercise of the will as such.¹³³ Today legislation to check concentrated economic power and promote or restore equality of bargaining power,¹³⁴ and judicial developing of relational duties and restriction on contracting away power to compete,¹³⁵ have changed the picture. Collective bargaining, administratively supervised,¹³⁶ standard contracts, standard clauses in contracts and prohibitions of particular agreements or clauses, cover an increasing field of individual relations.¹³⁷ Factory acts, housing laws, and minimum wage laws require compulsory terms to be incorporated in contracts. In Great Britain the Agricultural Act (1947),¹³⁸ the Landlord and Tenant Act (1949), the Housing Act (1936) and the Housing Repairs and Rents Act (1954)¹³⁹ allow administrative authorities to vary

131. See *ante*, § 96.

132. See *ante*, § 91.

133. Pollock, *First Book of Jurisprudence* (1 ed. 1896), 165.

134. Friedmann, *Law and Social Change in Contemporary Britain* (1951) 19, 20. See my review entitled *The Rule of Law and the Modern Social Welfare State* (1953) 7 *Vanderbilt Law Rev.* 1.

135. *Herbert Morris, Ltd. v. Saxelly*, [1916] A.C. 688.

136. *National Labor Relations Act* (1925) 49 Stat. 449, 29 U.S.C.A. §§ 151 ff.

137. Friedmann, *Law and Social Change in Contemporary Britain* (1951) chap. 3, and my review (1953) 7 *Vanderbilt Law Rev.* 1, 7-13.

138. See Davies and Mustoe, *Agricultural Law and Tenant Right* (4 ed. 1948) chap. 1.

139. See Clarke, *The Law of Housing and Planning* (5 ed. 1949) 1-9; Bramall, *The Housing Repairs and Rents Act* (1954) (2 ed. 1954) 1-10.

the terms of leases and leave little scope for free contracts. In case of nationalizing of an industry the public authority may terminate or disclaim contracts made by the company.¹⁴⁰ Also the contracts of industries under management or control by incorporated public authorities are creating difficulties where there are legal transactions between public authorities and private persons. All this should be compared with the proposition announced by Parsons in 1853 that all rights, duties, obligations and law grow out of legal transactions.¹⁴¹

(d) *Avoidance*.¹ Facts which may have the effect of preventing free or purposed functioning of the will of a party to a legal transaction are called by the French jurists *vices de la volonté*.² It has been suggested that the doctrine of "vices of the will," facts which vitiate the postulated free assent of the acting party, may be looked upon as a reaction from the purely formal equality between those who enter into legal transactions which was

140. Friedmann, *Law and Social Change in Contemporary Britain* (1951) 55-59.

141. 1 Parsons, *Contracts* (1853) § 1.

1. Holland, *Elements of Jurisprudence* (13 ed. 1924) 115; Pollock, *First Book of Jurisprudence* (6 ed. 1929); Paton, *Jurisprudence* (2 ed. 1951) 249-251; Pothier, *Traité des obligations* (1761) I, i, 1, art. 3; 1 Demogue, *Traité des obligations en général* (1923) nos. 216-217 *bis*; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 172-173; 1 Windscheid *Pandekten* (9 ed. 1906) § 82; 4 Savigny, *System des heutigen römischen Rechts* (1841) §§ 202-203; Kohler, *Einführung in die Rechtswissenschaft* (4 ed. 1912) 28-29.

2. Amos and Walton, *Introduction to French Law* (1935) 17; Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 307.

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assumed by freedom to enter into them.³ But the doctrine can achieve little toward maintaining equality of bargaining power since it does not take account of the pressure upon the will of one of the parties from social and economic conditions. In the law of today we seek to promote and maintain a real equality by such things as collective bargaining, standard contracts and standard clauses.⁴ In the maturity of law securing free functioning of the will was held back by zeal for the security of transactions. Today stress upon the social interest in security of transactions is much relaxed, witness the extension of bankruptcy from merchants to farmers, day laborers and, by way of reorganization and adjustment of indebtedness, to corporations of many sorts, and even to municipalities.⁵

Closely connected but distinct is what is called in French law *lesion (lésion entre majeurs)*. It has its historical origin in the Roman law (*laesio enormis*) provided for in two texts of the Code attributed to Diocletian, enacting that if land had been sold at less than half its value the seller could have the sale rescinded unless the buyer would make up the price to the full value.⁶ It is supposed that this was intended to protect small needy landowners against absorption of their property by the holders of large domains.⁷ This appealed to the canonists in the Middle

3. Demogue, *Traité des obligations en général* (1923) no. 217 *bis*.

4. See *post*, § 138, 3.

5. Bankruptcy Act, § 75 as enacted June 28, 1934, 48 Stat. 1289; National Bankruptcy Act. chaps. 10, 11, 12, 13.

6. Cod. 4, 44, 2, 8.

7. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) 277.

Ages as a moral doctrine, was developed by the glossators and commentators, and accepted by the French jurists in the eighteenth century, but was given up at the time of the French Revolution. The Civil Code limited it strictly.⁸ It was not followed in Anglo-American equity.⁹ But recent legislation in France and judicial decision in common-law jurisdictions in the service state which seeks to secure individuals against their improvidence and from burdens assumed which have become heavy is bringing back something of this in the law.¹⁰

Procedure has had some effect upon the theory of avoidance. Remedies for particular types of ground of avoidance were first devised specially for each and a general principle behind all of them came later. In Roman law there were *restitutio in integrum* (treating something as nonexistent), *exceptio doli* or *exceptio metus* (equitable defense of duress or of fraud). There has been and still is much discussion as to the limits and distinctions as to these remedies.¹¹ Working out of a general theory has been a task of the civilians. In Anglo-American law there are remedies in equity, enjoining the action at law on the transaction in order

8. Ibid. nos. 210-212. The remedy is rescission, id. no. 217.

9. Lord Nottingham said: "by the Civil Law a bargain of double the value shall be avoided and wish'd it were so in England." *Nott v. Hill*, 2 Ch. Cas. 120 (1682).

10. What Josseland calls *dirigisme contractuel* has become the rule in France. This is quoted in 2 Planiol, *Traité élémentaire de droit civil* (Ripert 4 ed. 1952) 445. Great Britain has gone further than we have in the United States. Friedmann, *Law and Social Change in Contemporary Britain* (1951) 39-59. See also Pound, *The Rule of Law in the Social Service States* (1955) 7 *Vanderbilt Law Rev.* 1, 9-10. But Anglo-American Courts of Equity by refusing specific performance of hard bargains went some way in this direction. Moreover, the course of judicial decision in France tends to consider mental weakness of one who makes a hard bargain in dealing with an aggressive and none too scrupulous dealer, although there is not actual essential error or fraud, may preclude a valid assent. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 172.

11. Buckland, *Text-Book of Roman Law* (2 ed. 1932) 593-595, 657, 722.

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to maintain an equitable defense (today superseded generally by an equitable defense in the action), cancellation in equity to prevent inequitable use of an instrument, reformation of an instrument for error of expression, rescission of a voidable transaction, and imposition of a constructive trust in case of fraud or abuse of a confidential relation. But the common-law courts, whenever an action for damages could do full justice, came to allow actions for restitution in case of voidable transactions and under reformed procedure allowed equitable defenses to be set up directly. If the transaction was void there was no need of resorting to equity unless to prevent inequitable use of an instrument. In consequence Anglo-American law, upholding the security of transactions, carefully distinguishes the void from the voidable. The defects in the expression of will do not destroy the transaction. They give the party whose declaration of will is vitiated a power of avoidance. This has not been so clear to the civilians.¹²

Facts which are grounds of avoidance are classified as duress (*metus*), mistake (*error*), and fraud (*dolus*).

(i) Duress.¹³ Where an act is procured by force or fear, i.e. threats addressed to the actor, there are two situations. In one, called by the Pandectists *vis absoluta*, a person without any exercise of his own will is

12. See the discussion as to *nul* and *inexistant* in 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 173, 283-285.

13. Holland, *Jurisprudence* (13 ed. 1923) 108-109; Salmond, *Jurisprudence* (1 ed. 1902) 385-386; Paton, *Jurisprudence* (2 ed. 1951) 370; American Law Institute, *Restatement of the Law of Contracts* (1932) §§ 492-499; Dig. 4, 2, 1; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 191-198; Saleilles, *De la déclaration de volonté* (1901) 30-60; 3 Savigny, *System des heutigen römischen Rechts* (1840) § 914; 1 Windscheid, (9 ed. 1906) § 80; French Civil Code, art. 111; German Civil Code, § 123(1); Japanese Civil Code, § 96.

made use of by physical force to bring about some result. Here there is no act. In the other, *vis compulsiva*, compulsion is applied to the will. The will is determined to perform an act through fear.¹⁴ Here it would obviously be inequitable to give legal efficacy to what was thus compelled and the transaction may be avoided. The first case turns upon lack of an essential element of an act.¹⁵ In the second case there is an act but it is voidable. In case of *vis absoluta* it is no matter whether the force is that of a party to the asserted transaction or of a third party.¹⁶ There is no legal transaction. But an anomaly in Roman law and a similar one in the common law must be noted. In Roman law manumission of a slave by duress of the master was void.¹⁷ At common law one who had signed and sealed a bond might defeat an action upon it by pleading affirmatively that it was executed under duress.¹⁸ But the anomalous rule in each case antedated

14. Arndts, Pandekten (5 ed. 1883) § 61.

15. E. g. when a person sensitive to hypnotism by another while under the latter's complete hypnotic control is told to write his name on a piece of paper handed him and signs a promissory note. American Law Institute, Restatement of the Law of Contracts (1932) § 494(b) p. 951, but such a case seems not to have arisen in practice. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) p. 255. Compare where a vessel was blown by a hurricane into a forbidden port. *Hallet v. Jenks*, 3 Cranch (U.S.) 210, 219, 2 L.Ed. 414 (1805).

16. Restatement of Contracts, § 494.

17. Dig. 49, 9, 9. But see Buckland, *Text-Book of Roman Law* (2 ed. 1932) 416.

18. Ames, *Lectures on Legal History* (1913) 113.

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the development of equity. Equitable relief by way of avoidance put duress on the same basis as fraud.¹⁹

In connection with duress as a ground of avoidance we must take account, on the one hand, of the social interest in the individual life and consequent solicitude for the individual free will, and, on the other hand, the social interest in the general security in the form of an interest in the security of transactions. To hold transactions procured by *vis compulsiva* void, so that they would fail as against third parties who for value without notice have acquired interests under or on the faith of them, would over-secure the individual free will. Hence where the transaction was brought about by coercion on the part of the beneficiary of the transaction the principle that no one is to be unjustly enriched for the benefit of another is applied to allow restitution. The security of transactions is not infringed. Otherwise where one is coerced to confer a benefit upon another by duress applied by a third person. If the beneficiary took no part in and had no notice of the coercion and especially if he has changed his position on the faith of the transaction it is not voidable.²⁰

Duress in the sense of *vis compulsiva* is defined by the American Law Institute as "any wrongful threat of

19. Holmes, J., in *Fairbanks v. Snow*, 145 Mass. 153, 13 N.E. 596 (1887).

20. American Law Institute, *Restatement of the Law of Restitution*, § 70, pp. 289-290. To the same effect French Civil Code, art. 1111; 6 Planiol et Ripert, *Traité de droit civil français* (1930) no. 194.

one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment. . . .”²¹ The decisive point is the overcoming of the will by putting in fear. What is the measure of fear required to avoid a transaction? This question must be answered with due regard to the security of transactions. The common-law texts speak first of “duress of imprisonment.”²² But here what really overcomes the will of the actor is the fear of continued imprisonment. Hence the classification into duress of imprisonment and duress by threats²³ is superfluous. Indefinite imprisonment is threatened. Are the threats to be judged by their intrinsic severity or with reference to their effect upon persons generally, or with respect to their effect upon the person threatened in view of his condition and character?

At first the common law limited duress by threat to threats of loss of life or of limb. “A fear of battery or being beaten, though never so well grounded,” says Blackstone, “is no duress; neither is the fear of having one’s

21. *Id.* Restatement of the Law of Contracts (1932) § 492(b).

22. 1 Blackstone, *Commentaries on the Laws of England* (1765) 131. Compare American Law Institute, *Restatement of the Law of Contracts* (1932) § 403.

23. “It is what may happen in the future that is the essential element in fear, and consequently in duress. The threatened future situation may be, however, a mere continuance of what has already been begun.” American Law Institute, *Restatement of the Law of Contracts* (1932) 940.

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house burned, or one's goods taken away or destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages,²⁴ but no suitable atonement can be made for the loss of life or limb."²⁵ This is not a conscious overweighing of the security of transactions. It is a hold-over from the attitude of the strict law. A man of full age must take care of himself. The law will not help the timid or the foolish.²⁶ Long before Blackstone the Court of Chancery had cancelled bonds obtained by menaces.²⁷

As equitable relief was developed it came to be held that the measure was whether a reasonable man could reasonably be expected to withstand the threat. There must be a threat which would overcome the will of a very firm man,²⁸ or of a reasonable man,²⁹ or threat of a not inconsiderable evil,³⁰ or some unlawful threatened evil

24. Citing Coke's Second Institute (1642) 483.

25. 1 Commentaries, 131. See also Dig. 40, 9, 9, Cod. 2, 4, 14.

26. See Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 *Harvard Law Rev.* 195, 212. *Ante*, § 32, 3.

27. *Ward v. Locke*, Toth. 26 (1628-9). If the bonds had been extorted by actual imprisonment there would have been no case for equity. Defence would have been made at law. See note 18, *supra*.

28. Dig. 4, 2, 6; *id.* 4, 2, 7.

29. French Civil Code, art. 1112; Louisiana Civil Code, art. 1157; Spanish Civil Code, art. 1267; Bell, *Principles of the Law of Scotland*, § 12.

30. Dig. 4, 2, 5; Arndts, *Pandekten* (14 ed. 1899) § 61; 1 Dernburg, *Pandekten* (8 ed. 1911) § 91. See 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 191.

which did in fact overcome the will of the party who acted in the case in hand, treating what would overcome the will of a reasonable man as evidential only.³¹ The objective test has been progressively relaxed and the present-day tendency is to ask simply whether the person entering into the transaction was in fact put in such fear as to preclude exercise of his free will and judgment. "Persons of a weak and cowardly nature are the very ones influenced by threats, and the unscrupulous are not allowed to impose upon them because they are unfortunately constituted." ³²

In Anglo-American law, courts of equity greatly enlarged the scope of interference with freedom of will in entering into legal transactions. Under the term "undue influence" transactions were held voidable where pressure of persuasion rather than fear, or persuasion coupled with fear, induced them. Where there was abuse of a confidential relation, avoidance was put on the ground of breach of trust. But in the absence of any confidential relation, where mental weakness, not of itself sufficient to constitute incapacity, is coupled with hard bargain, over-persuasive pressure taking advantage of pecuniary necessity, ignorance or want of advice, a contract or conveyance procured by these means may be avoided. Today, as the procedural distinction between law and equity has ceased to be significant, much of equity doctrine has been absorbed into the law and undue influence is coming to be treated as in effect a species of duress: "The pressure [of persuasion] must be improper and excessive

31. American Law Institute, *Restatement of the Law of Contracts* (1932) § 492, p. 939.

32. *Ibid.*

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beyond what is reasonable under the circumstances in order to constitute either duress or undue influence.”³³ Sir Frederick Pollock put it thus: “Any influence brought to bear upon a person entering into an agreement or assenting to a disposal of property which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence.”³⁴

Coercion by a third person raises a question as to the theoretical basis of avoidance for duress. Is it want of the free exercise of the will which is an essential element of a legal transaction, or is it preventing unjust enrichment of the beneficiary of the transaction? It is well settled that duress by a third party is a ground of avoidance.³⁵ Also it is hardly less generally held that force is not a ground of avoidance or of restitution when employed to bring about performance of an exact and undisputed legal duty, e. g. an exact, liquidated, overdue, undisputed debt.³⁶ Shall we say that these two situations must stand on the same ground, namely, either upon the ground of unjust enrichment of the beneficiary of the transaction procured by force or threats or on the ground of overcoming of the

33. American Law Institute, *Restatement of the Law of Contracts* (1932) p. 941.

34. Pollock, *Contracts* (2 ed. 1876) 503. See what was said by Lord Chelmsford in *Williams v. Bayley*, L.R. 1 Engl. & Ir.App. 200, 219 (1866). There is said to be public policy against enforcing a contract obtained by extreme moral pressure, *Kaufman v. Gerson*, [1904] 1 K.B. 591.

35. American Law Institute, *Restatement of the Law of Restitution* (1937) § 70, pp. 289-290; French Civil Code (1800-1804) art. 1111; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 184; German Civil Code (1874-1900) § 123(1).

36. American Law Institute, *Restatement of the Law of Contracts* (1932) pp. 952-953; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 196.

will of the actor by duress by whomsoever employed? Or shall we say that it depends upon whether the force employed is or is not unlawful? But it can hardly be said that assault and battery in order to collect a liquidated, past due, undisputed debt is lawful, although French doctrinal writers say it is not "illegitimate"—meaning, I suppose, that there is a legal privilege of forcible collection of undisputed debts.³⁷ But the proposition that the coerced payment is not voidable is not universally accepted. Julian held that one who applied force to his debtor to coerce the latter to pay him was not bound to make restitution under the *actio metus causa* because he was not injured when he paid what he was bound to pay. Ulpian, however, held that by the resort to violence the creditor lost his *jus crediti* and could not hold the money as due him on the debt.³⁸ German commentators on the civil code have differed.³⁹ However the American cases go on the ground that the person who coerced payment is retaining money which in justice ought to be returned.⁴⁰ May not the solution be that there is no restitution, where payment of an undisputed, liquidated, overdue debt is coerced, because the creditor is not enriched by getting what is due him, whereas in case of a transaction coerced by a third person the beneficiary gets something which is not due him—to which he has no claim—otherwise than through the coerced transaction. The result seems to be that the basis of avoidance is prevention of unjust enrichment.

37. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 196, p. 261 and doctrinal writers cited in note 3.

38. Dig. 4, 2, 12, § 5.

39. Holding there can be no restitution, 1 Cosack, *Lehrbuch des bürgerlichen Rechts* (8 ed. 1927) § 65. Contra, for the reason coercing payment of a debt by battery is unlawful, Bernhöft, *Das bürgerliche Recht* (in Birkmeyer, *Encyklopädie der Rechtswissenschaft*, 1901) § 49.

40. Cases cited in *Koenig v. Peoples Gas Light & Coke Co.*, 153 Ill.App. 432, 437 (1910).

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As to constraint of necessity, the result of events rather than of acts, in Roman law the praetor provided a penal action to repress violence and protect persons coerced. Hence in France the traditional doctrine only avoided a transaction entered into under the sway of fear when it was induced by violence or menaces of a person. Accordingly, the French Civil Code⁴¹ speaks of consent extorted by violence. Modern civilians maintain this opinion.⁴² But, say Planiol and Ripert, it seems shocking that one who has promised an excessive remuneration in order to be saved from the menaces of a grave danger proceeding from an external cause should be held, e. g. in case of a catastrophe such as shipwreck. Pothier proposed that the judge reduce the amount promised.⁴³ But this is not satisfactory. Some French authors consider that there should be avoidance here, allowing an equitable remuneration for the service rendered on the theory of *negotiorum gestio*, service rendered another not officiously, or unjust enrichment.⁴⁴ However the Court of Cassation has announced a general rule giving a wide application to the principle of avoidance for defect of free exercise of the will. The consent is said to be extorted even where the peril comes from external events when the beneficiary of the promise exercised pressure to obtain it by abusing the situation. It is said that in such a case there is duress exercised by the promisee in bringing about the transaction.⁴⁵ The doctrine of Anglo-American equity as to refusing specific performance of hard bargains coupled with sharp practice would not apply to the case put because the contract to pay money would not be in

41. Art. 1109.

42. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 195.

43. *Traité des obligations* (1761) no. 24.

44. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 195.

45. *Ibid.*

the jurisdiction of a court of equity. In admiralty, in England and in the United States, the courts do not go so far in treating salvage contracts as in the discretion of the court as the practice in Continental Europe. But where advantage is taken of an apparently helpless condition to impose an unconscionable bargain the courts have refused to enforce it on the ground of moral compulsion.⁴⁶

(ii) Mistake.⁴⁷ Historically, in Anglo-American law the courts of law and the court of equity at first were not in accord as to what is a legal transaction. Equity sought to make the outward act—the expression—and the inward act—the exertion of the will—conform. It treated the latter as the substance, while the law treated a contract as resulting from a concurrence of declarations or expressions of the will. But recognition of the social interests in the security of transactions has led to acceptance of the declaration theory in equity as well as at law. The chancellors considered that they could “search the conscience” of a party to a suit by examining

46. The cases are collected and reviewed in *The Elfrida*, 172 U.S. 186, 19 S.Ct. 146, 43 L.Ed. 413 (1898).

47. Holland, *Elements of Jurisprudence* (13 ed. 1924) 119–123; Pollock, *Principles of Contract* (10 ed. 1936) chap. 9; Salmond, *Jurisprudence* (1902) 458–462; Paton, *Jurisprudence* (2 ed. 1951) 366–370; American Law Institute, *Restatement of the Law of Contracts* (1932) §§ 501–511; *id.* *Restatement of the Law of Restitution* (1937) §§ 6–69; 3 Savigny, *System des heutigen römischen Rechts*, §§ 135–139 and Beilage viii (1840); Saleilles, *De la déclaration de volonté* (1901) 12–39; 6 Planol et Ripert, *Traité pratique de droit civil français* (1930) nos. 174–190; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 76–79; Zitelmann, *Irrtum und Rechtsgeschäft* (1879); Leonhard, *Der Irrtum als Ursache nichtiger Verträge* (2 ed. 1907); Schuster, *German Civil Law* (1906) § 99.

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him under oath. One side of a court has no advantage over the other in this respect today. The saying in the Year Books that "The Devil himself knows not a man's intent" has been justified by experience. But on the whole the theory of nullity among the civilians has been to refer it to a want of correspondence between the will and its expression unless due to mental reservation. They make this consist with the security of transactions by rules as to proof of the will of the actor claiming nullity.⁴⁸ It has been suggested that "expression of the will consists not in the literal or surface meaning of words and deeds but in the meaning which under all the circumstances other persons are justified in putting on those words and deeds."⁴⁹ Indeed Savigny, the principal exponent of the will theory, admits that the difference between the will and the expression or declaration of the will can only be important when it can be known to others.⁵⁰ Elsewhere I have argued that it is a jural postulate of life in a civilized society that "men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence will carry out their undertakings according to the expectations which the moral sentiment of the community attaches to them."⁵¹ Accordingly, if we admit the will

48. E. g. by presumptions. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 187.

49. Holland, *Jurisprudence* (13 ed. 1929) 122.

50. 3 Savigny, *System des heutigen römischen Rechts* (1840) 258.

51. Pound, *Introduction to the Philosophy of Law* (rev. ed. 1954) 133.

theory in a sense we must call not for an inscrutable will to which the expression or declaration must correspond but for one which could reasonably be known by those to whom words or acts are addressed.

With the foregoing qualifications in view, the Pandectist classification of a mistake⁵² is still useful. They tell us that in one type of case the difference between will and expression may be intentional: due to mental reservation; or to use of words which would usually operate as a legal transaction, but are obviously used with no intention that they shall have that effect, e.g. are used in jest, or in the theatre, or in the lecture room; or when phrases appropriate to legal transaction of one kind are employed notoriously in order to result in a legal transaction of another sort;⁵³ or in case of what the civilians call simulation.⁵⁴ Or the difference may be unintentional.

In the latter case three situations are distinguished: (1) Mistake such that there is no mutual assent. The parties do not declare assent to the same thing, although the writing appearing to embody the transaction makes

52. 3 Savigny, *System des heutigen römischen Rechts* (1840) 258; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 75-77.

53. E. g. the penalty in a bond or the formal conveyances of legal title in a mortgage where the lien theory obtains.

54. I. e. where a number of persons agree to give their transaction a meaning it would not naturally have by a secret collateral agreement either wholly destroying its effect, or modifying its nature, or content, or changing the beneficiary. This is binding on the parties to the secret agreement, but strangers to it may ignore it to take advantage of the apparent transaction. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 100.

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it so appear. Here there is no legal transaction although the writing as it stands alone would show one that does not exist. (2) The parties do assent to the same declaration of will but do so because of mutual mistake as to the transaction, object, or person (where person is material). These are said to be essential to the transaction as compared with motive in making the declaration assented to or characteristics or qualities of the object dealt with. (3) Mistake which prevents proper expression of the transaction—error of expression.

Equity does not change the transaction (e. g. contract) in these cases. Cases (1) and (2) are said in the books to be mistakes which vitiate consent and are called essential error. But in case (1) there is no mutual assent. In the Anglo-American system at common law the purported transaction fails and will not be given effect. If, however, it was extended in a writing which can be used to embarrass one of the parties, he may have the equitable relief of cancellation. In case (2) there is a transaction but it is subject to the equitable remedy, or today the equitable defense, of rescission. In the civil-law system, it will be annulled. Here again, in the common-law system if a written instrument embodying the transaction can be used to embarrass one of the parties, there may be the equitable remedy of cancellation. Case (3) in Anglo-American law calls for the equitable remedy of reformation to make the written instrument conform to what was actually assented to.⁵⁵

In the first of the three cases in the next to last paragraph, called by the Pandectists "misunderstanding"⁵⁶ in a bilateral

55. The English texts say "rectification." Ashburner, *Principles of Equity* (2 ed. 1933) 277-279.

56. Baron, *Pendekten* (7 ed. 1890) 88.

transaction each party errs with respect to the will of the other and expresses an intention which does not correspond thereto. This happens when an ambiguous term is used which is understood differently by the respective parties, as in the well known English case in which the contract had to do with cotton to arrive by the ship *Peerless* from Bombay and there were two ships of that name arriving at different dates which were very material to the bargain,⁵⁷ or when there is mutual mistake as to the nature of a transaction, e. g. one pays a sum as a loan and the other receives it as a gift, so that there is neither loan nor gift, no duty to comply with the customary terms of a loan, but a duty of restitution of the money, subject to an equitable defense of change of position, or where V, mistakenly thinking he owns Blackacre, contracts to sell it to P who thinks V means to acquire Blackacre and convey it to him.

In the second of the three cases, essential error, there are three types: (a) mistake as to the nature of the transaction (*error in negotio*). Here the transaction cannot be enforced, but where the parties intended one transaction and executed another there may be reformation or rectification to make the instrument of execution express what both intended. An example may be seen in a leading American case.⁵⁸ All the parties intended the surety who signed a bond to release D from arrest in *ne exeat* should sign and plaintiff supposed he was signing a bond conditioned that D would appear in a pending suit. The bond was drawn by an attorney of the creditor conditioned that D should perform the decree. Decree having gone against D an action was brought upon the bond and the surety sued to enjoin enforcement. Injunction against enforcement of the bond was decreed. The court considered that this might be a case of misun-

57. *Raffles v. Wichelhaus*, 2 Hurlst. & Coltm. 906 (1864).

58. *Griswold v. Hazard*, 141 U.S. 260, 11 S.Ct. 972, 35 L.Ed. 678 (1891). See German Civil Code, § 119.

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derstanding or one of error of expression; the creditors' attorney meant one thing and the surety another, or else one of error of expression—the parties intended a bond to appear and by mistake used a blank bond to appear and perform the decree. As D had appeared and contested the suit reformation could be no use so enforcement was enjoined. If it were held on the facts that both parties intended only a bond to appear the bond as executed should not be enforceable because of essential error as to the nature of the transaction entered into. (b) Mistake as to the person (*error in persona*)—the actor intends a different person than the one expressed in the declaration of will. This type of mistake only affects the transaction if the person is material. E. g. in a sale for cash the person who is buyer is usually no matter. But in a sale on credit the person is highly material. There is a choice of persons.⁵⁹ Jhering put the case of two sisters, Antonia X and Augusta X, the one a celebrated, the other a mediocre, singer. Suppose a manager sent a cable message offering exceptional terms to Mlle. A X and it was delivered to Augusta?⁶⁰ Here the point as to *error in persona* might be complicated by a question of whether Augusta could reasonably suppose the offer was intended for her. (c) Mistake with respect to the object (*error in corpore*)—mistake as to the existence or identity of the object presupposed by the transaction; the object had ceased to exist at the time of the transaction (e. g. a contract to sell a race horse in a stable in another state which had been killed in a fire a few hours before the contract was made); or what the parties believed to be and in good faith contracted to buy and sell as a proved up claim to a mineral tract on the public domain was still awaiting final proof and diligent prosecution of application for patent and so was

59. French Civil Code, art. 1110.

60. Jhering, *Law in Daily Life* (transl. by Goudy 1904) xiv, 20.

subject to relocation,⁶¹ and hence was not what the parties thought they were dealing with. But in case of *error in corpore* the parties may contract expressly as to the risk.

Mistake in motive, mistake as to characteristics and qualities and unilateral mistake are distinguished from mutual essential error. The reason for denying relief where there is mistake only in the motive is the need of weighing against the individual interests of one who acts on mistaken motive the social interest in the security of transactions. The other party had nothing to do with the mistake⁶² and it does not inhere in the declaration of will. But what is decisive is the economic reason, the security of transactions, which should be upheld in order to maintain the economic order, unless failure of an essential element of the transaction makes a strong case of impairment of the interest in individual free self-assertion. Motives are too shifting, too varying in degree of weight, too complex and too little susceptible of proof to be weighed against the security of transactions.

Mutual mistakes as to characteristics or qualities of the object dealt with is called in the English and American books mistake as to a collateral matter. In a balancing of interests, characteristics or qualities, as distinguished from existence or identity, are considered not an essential element of the transaction. But in a sale a mistake as to qualities which in mercantile understanding determine the nature of the object, called by the civilians *error in substantia*, is treated in the civil law as essential error.⁶³ In sale of a note both parties mistakenly assume that it

61. See 2 Lindley, *American Law Relating to Mines and Mineral Lands* (3 ed. 1914) §§ 695-696.

62. "Mistaken motives manifestly could not be considered in any system that we should call rational except against one who is privy to those motives." Mr. Justice Holmes, *The Path of the Law* (1897) 457, 472.

63. 3 Savigny, *System des heutigen römischen Rechts* (1840) §§ 137, 138; Saleilles, *De la déclaration de volonté* (1901) no. 14; 6 Planiol et Ripert,

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is secured by a mortgage. Was the object of the transaction a *note* or a *secured note*? To a note broker and his customer they are not the same thing.⁶⁴ But in *Hecht v. Batchelder*,⁶⁵ there was sale of a note through brokers. Unknown to any of the parties the makers had made an assignment for the benefit of creditors two days before the sale. The buyer claimed to rescind for the mistake. The court held that the common mistake was not as to the existence or identity of the object sold but as to quality or value—collateral attributes of the object. Query—Was the sale one of *this piece of paper* or of a *piece of commercial paper*, not a claim for a dividend against an estate in insolvency proceedings? The presupposition here was that the parties were buying and selling commercial paper. Most of the cases on mistake as to characteristics or qualities have to do with value. The Restatement of Contracts announces a much better proposition than the cases as to sale of notes. It is said: "No more specific rule . . . as to all these cases can be stated than that the mistake shall be as to a matter that vitally affects the basis upon which the parties contract, but a mistake as to a person or thing to which the contract relates will almost always be of vital importance."⁶⁶

We have been speaking of mutual mistake, a mistake of fact common to the parties. In case of unilateral mistake, mistake

Traité pratique de droit civil français (1930) no. 183. "A mistake as to any characteristics of the person or thing which are regarded in ordinary dealings as essential is also deemed to be a mistake concerning the purport of the declaration." German Civil Code (Wang's transl. 1907) § 119, 2.

64. But rescission was denied in such a case where a mutual mistake unknown to both parties, on the ground that the mistake was as "a collateral fact." *Sample v. Bridgforth*, 72 Miss. 293, 16 So. 876 (1894).

65. 147 Mass. 335 (1888). *Bicknell Skinner v. Waterman*, 5 R.I. 43 (1857) acc.

66. American Law Institute, Restatement of Contracts (1932) § 502, pp. 963-964.

on one side of the transaction only or of the actor in a unilateral transaction, relief for mistake has to take account not only of the social interest in the security of transactions but of a traditional attitude coming down from the refusal of the strict law to give relief for mistake at all. The strict law would not help foolish persons who made mistakes. A unilateral mistake may be on one side of a bilateral transaction or in a unilateral transaction, e. g. a gift, or in a unilateral act in performance of a bilateral transaction, e. g. execution of a deed in performance of a contract. The mistake may result in including too much in what is done or in including too little. Also it is important to consider who is complaining, whether the donor or settlor in case of a trust or the donee or beneficiary, and against whom complaint is made, whether donor or settlor or maker or the heirs of donor or settlor or maker or a creditor in case of giving security. As a general proposition it is well settled that there will not be reformation in case of unilateral mistake. As it has been well put, this is the rule in the ordinary case of rectifying mistakes in an instrument where it is sought to alter an instrument in any prescribed or definite manner, for the reason that in such case it is necessary to prove not only that there has been a mistake but also what was intended to be done in order that the instrument may be set right according to what was intended. In such a case if the parties took different views as to what was intended there would be no contract between them which could be carried into effect by rectifying the instrument.⁶⁷ The error of expression must be mutual. Otherwise there is no contract at all—no meeting of minds.

English decisions allow rescission for unilateral error so long as the transaction remains executory.⁶⁸ American courts

67. Turner, L. J. in *Bently v. Mackey*, 3 DeG. F. & J. 279, 286–287 (1862).

68. *Harris v. Pepperell*, L.R. 5 Eq. 1 (1867).

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are divided.⁶⁹ A decisive consideration in cases of unilateral mistake is the security of transactions. If the transaction remains executory and there has been no change of position, relief should be granted. Courts which deny relief say they are refusing relief against one's own folly, the ground on which the strict law so refused or narrowly limited all grounds of avoidance. Avoidance in case of executed transactions is another matter. In case of gift, a conveyance of more than was intended may be corrected at suit of grantor against grantee but not at suit of donee who receives less by mistake.⁷⁰ However, although not allowed against the donor, relief is given against representatives of a deceased donor on a presumption, where the mistake is clearly proved, that if donor were alive he would rectify the mistake.⁷¹

Mistake of law may be mutual mistake in a bilateral transaction or unilateral mistake in a bilateral transaction or unilateral mistake in a unilateral transaction. The principle of relief (avoidance, rescission or rectification) should be the same as in corresponding case of mistake of fact. But the subject has been embarrassed in all systems of law by a bad start in Roman law, taking over in the common law of restitution for unjust enrichment

69. Allowing rescission, *St. Nicholas Church v. Knopp*, 135 Minn. 115, 160 N.W. 500, L.R.A.1917D, 741 (1916); *Board of Education v. Bender*, 36 Ind. App. 164, 72 N.E. 154 (1905); *Harper v. Newburgh*, 159 App.Div. 695, 145 N.Y.S. 59 (1913). Contra, *Steinmeyer v. Schroepfel*, 226 Ill. 9, 80 N.E. 564, 10 L.R.A.,N.S., 114 (1907).

70. *Elliott, J., in German Mut. Ins. Co. v. Grim*, 32 Ind. 249, 253 (1869); *Turner v. Collins*, 7 Ch.App. 339, 342 (1871); *Bond v. Dorsey*, 65 Md. 310, 4 A. 279 (1886); *Day v. Day*, 84 N.C. 408 (1881).

71. *McMechem v. Warburton*, [1896] L.R.Ir. 435. But see *Strayer v. Dickerson*, 205 Ill. 257 (1903) and note by Professor Schofield, 2 Ill.Law Rev. 42 (1907).

of a misapplied maxim of the criminal law, a mistaken treatment in Judge Story's classical text on equity, and holdover of the reluctance of the strict law to help the weak or foolish who do not measure up to a firm and diligent assertion at all times of their own best interests. In Roman law mistake of law was a ground of relief only as to minors (over fourteen and under twenty-five), women, and soldiers. Then, moreover, it was a defense, not a ground of an affirmative proceeding for relief.⁷² The civil law piled up exceptions.⁷³ Finally, the general language of the French Civil Code⁷⁴ was taken advantage of in interpretation by the commentators to bring about a doctrine that there is no difference between mistake of law and mistake of fact.⁷⁵ In the Italian Civil Code⁷⁶ the same result is expressly provided for if the mistake of law is the sole cause of the transaction. The German Civil Code makes no difference between mistake of law and mistake of fact.⁷⁷

In English law the courts made a good start. Both at law and in equity the courts down to the beginning of

72. Dig. 22, 6, 2, pr.

73. Domat, *Lois civiles dans leur ordre naturel* (1694) pt. I, liv. I, tit. 18, §§ 13-15.

74. Art. 1110 (1804).

75. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 181; 1 Baudry-Lacantinerie, *Traité de droit civil* (2 ed. 1899) no. 70.

76. Arts. 1109, 1110 (1865).

77. Schuster, *Principles of German Civil Law* (1907) § 99. See also Chill, *Civil Code* (1855) art. 1452; Mexico, *Civil Code* (1870, rev. 1884) art. 1256.

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the nineteenth century made no distinction between mistake of law and mistake of fact.⁷⁸ But the current of authority was changed by the oft cited case of *Bilbie v. Lumley* in 1802,⁷⁹ a case heard at nisi prius before Lord Ellenborough who apparently did not know and was not apprized of the older decisions and applied a maxim of criminal law that everyone is presumed to know the law laying down dogmatically that no one was excused by ignorance of the law as a rule barring recovery of money on the ground of unjust enrichment where paid under mutual mistake of law. Eminent equity judges in England, however, have denied that it was at all a rule in equity.⁸⁰ For a time *Bilbie v. Lumley* was generally accepted in America. But as usually happens with rules out of line with principles of law, exceptions soon began to develop. At least ten exceptions came to be established by good authority although the Supreme Court of Illinois, which has consistently adhered to the attitude of the strict law, has denied one of them.⁸¹ Moreover, two states

78. At law: *Hewer v. Bartholomess*, Cro.Eliz. 634 (1597); *Bonnel v. Fowks*, 2 Sid. 4 (1667); *Farmer v. Arundel*, 2 W.Bl. 824 (1772); *Bize v. Dickason*, 1 T.R. 245 (1786). In equity, *Turner v. Turner*, 2 Rep.Ch. 154 (1679); *Lansdown v. Lansdown*, 2 Jac. & W. 205, *Mosely*, 364 (1730); *Bingham v. Bingham*, 1 Vesey Sr. 126 (1748).

79. 2 East 469 (1802).

80. See quotation in the opinion of Lumpkin, J. in *Wyche v. Green*, 16 Ga. 49, 58-59 (1854).

81. *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 535, 85 N.E. 200, 18 L.R.A.,N.S., 124 (1908). Also Pennsylvania has held strictly to the rule. In *Fink v. Farmers' Bank*, 178 Pa.St. 154, 167, 35 A. 636, 637 (1896) the court says: "The Pennsylvania cases have not yet followed the refinements by which

allow relief in transactions in ignorance of law, but distinguish between mistake of law and ignorance of law⁸²—more an attempt to get away from the rule than a valid distinction. Ignorance is the cause and mistake the effect. Also where an oral agreement is made and subsequently the parties undertake to put it in written form and through mistake of law so draw up the writing as not to express the oral contract they intended to make, it is held there may be reformation of the writing. Yet, it is said, if the written contract was the actual contract of the parties and was so made because of mutual mistake of law, and thus did not accord with their real intention, there could be no relief.⁸³ The ground of this distinction seems to be the social interest in the security of transactions which is taken to require us not to interfere with contracts. Nevertheless, in most of the generally accepted ten exceptions that is what is done. It came to be said that in all cases other than the ten, or maybe twelve, exceptions, mistake of law will never be ground of relief. But what is left after the exceptions? Sub-

the ancient rule that ignorance of law excuses no man has been restricted if not frittered away." To the same effect *Clark v. LeHigh & Wilkes-Barre Coal Co.*, 250 Pa. 304, 95 A. 462 (1915).

82. *Culbreath v. Culbreath*, 7 Ga. 64 (1849); *Hopkins v. Mazyek*, 1 Hill. Eq. (10 S.C.Eq.) 242 (1933).

83. *Philippine Sugar Co. v. Philippine Islands*, 247 U.S. 385, 389, 38 S.Ct. 513, 514, 62 L.Ed. 1177 (1918); *Snell v. Insurance Co.*, 98 U.S. 85, 88, 25 L. Ed. 52 (1878); *Griswold v. Hazard*, 141 U.S. 260, 11 S.Ct. 972, 35 L.Ed. 678 (1891); *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290 (1871); *Maher v. Hibernia Ins. Co.*, 67 N.Y. 283, 291 (1876); *Wisconsin Marine & Fire Ins. Co. Bank v. Mann*, 100 Wis. 596, 617, 76 N.W. 777, 784 (1898).

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stantially little if anything beyond cases when there would be no relief if the mistake had been one of fact.⁸⁴ The Restatement of the Law of Restitution, under the auspices of the American Law Institute, lays down as a general rule: "A person who has paid money or otherwise conferred a benefit upon another induced thereto by a mistake of law is not entitled to restitution if he would not have been so entitled if the mistake had been one of fact."⁸⁵ It then goes on to say that except in cases set forth in the ten following sections, "a person who, induced solely by a mistake of law, has conferred a benefit upon another to satisfy in whole or in part an honest claim of the other to the performance given, is not entitled to restitution."⁸⁶ Does this mean unilateral mistake in a unilateral transaction? This curious attempt to save the face of a moribund mistaken rule, after denying that mistake of law can have broader effect than mistake of fact, then sets forth the ten settled exceptions to the supposed rule denying relief for mistakes of law. The result is substantial abandonment of the rule.

How did Story, whose discussion of the subject seems to have been decisive in leading American courts to insist on treating mistake of law as something governed by a different rule from

84. E. g. *Hunt v. Rousmaniere*, 1 Pet. (U.S.) 1, 7 L.Ed. 27 (1828); cases of mistake as to motive or as to collateral attributes—*Griffith v. Sebastian County*, 49 Ark. 24, 3 S.W. 886 (1886).

85. American Law Institute, *Restatement of the Law of Restitution* (1932) § 44.

86. *Ibid.* § 45.

essential error or error of expression where the mistake is one of fact, come to take the position he did in view of the old English cases in equity? ⁸⁷ Apparently the texts of the Roman law in the Digest, the positive pronouncement by Domat, and the general acceptance of a distinction between mistake of law and mistake of fact by the civilians (until the commentators on the French Civil Code and the French courts following them later brought about a sound doctrine of applying the doctrine that in legal transactions none should be allowed to enrich himself unjustly at the expense of another to both kinds of mistake) led Story to assume as a matter of natural law that there was a principle agreed on by all jurists that differentiated mistake of law from mistake of fact. Grotius considered that the Roman law and consensus of the teachers of the civil law was declaratory of the law of nature.⁸⁸

Two objections have been urged against treating cases of essential error alike whether the mistake is of law or of fact. One is the case of compromise of a doubtful claim, honestly asserted, where there is doubt as to the law.⁸⁹ This was urged also by Story.⁹⁰ But the Restatement of Restitution lays down a like rule in case of mistake of fact.⁹¹ Where there is an honest mistake made on one side and an honest intent on both sides to compromise, ignorance on one side is not an essential error. His ignorance or mistake of law only went to his motive. He preferred to settle rather than to litigate. This is so whether he was ignorant of or mistook either law or fact. Again it has been said that the English cases overstrain the requirement of consensus and so "put a premium on negligence at the expense

87. 1 Equity Jurisdiction (1836) § 137.

88. De jure belli ac pacis, i, 1, 12 (1625).

89. Restatement of the Law of Restitution (1932) § 45.

90. 1 Equity Jurisdiction (4 ed. 1846) § 137.

91. § 19.

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of innocent traders who acquire from the purchaser in an avoid-ed transaction.”⁹² But change of position and negligent imposition of risk upon others are long established bars to equitable relief. This meets the objection sufficiently.

(iii) Fraud.⁹³ Holland puts the common-law action for damages for deceit and the suit in equity to avoid a transaction entered into in reliance upon fraudulent misrepresentation on the same theoretical basis of infringement of a right *in rem* of “immunity from fraud.”⁹⁴ But are the two on the same theoretical basis? In the action for deceit there is an intentional infringement of the actor’s general interest of substance or there may be, according to the better doctrine, a subjection of his general interest of substance to an unreasonable risk resulting in injury. In case of avoidance of a transaction for fraud the basis is preventing of unjust enrichment. Where fraud has prevented free intelligent exercise of the will of one who has entered into a transaction the bene-

92. Cheshire and Fifort, *English Law of Contracts* (1945) 178. *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489, rightly criticised by Cheshire and Fifort, does not show over-straining of the idea of consensus so much as a misconception of negligence by seeking a duty of the negligent actor toward the person injured—some relation between the negligent actor and the person injured—whereas the question is as to who and what was within the ambit of the risk created.

93. 1 Windscheid, *Pandekten* (9 ed. 1906) § 78; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 199–207; American Law Institute, *Restatement of the Law of Contracts* (1932) §§ 470–491; Pollock, *Law of Fraud in British India* (1894) chap. 2; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1905) § 234.

94. *Jurisprudence* (13 ed. 1924) 232, 239.

ficiary of the transaction ought not to be unjustly enriched at the actor's expense.⁹⁵ This rather than full securing of the free will of the actor is the basis of relief. In an action for deceit the relief is reparation. In avoidance in equity the relief is restitution or rescission. Fraud by intentional deception is significant if the other party has caused the mistake in order to bring about a rescission. Also this is an unethical infringement upon freedom of determination. The will is bound through the created mistake and made serviceable to the one who caused the mistake.⁹⁶

Fraud as a ground of avoiding legal transactions, for the term has other meanings in other connections, means "misrepresentation known to be such or concealment, or non-disclosure (where not privileged) by any one intending or expecting thereby to cause a mistake by another to exist or to continue in order to induce the latter to enter into or refrain from entering into a transaction" ⁹⁷ In another connection Lord Hardwicke said: "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoid-

95. It is so put by Ulpian in Dig. 4, 3, 1, pr.

96. 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1905) 522. "When a transaction is entered into because of an intentional misrepresentation the resulting mistake need not be an essential one." Swiss Code of Obligations (rev. of 1911) art. 28, 1.

97. American Law Institute, *Restatement of the Law of Contracts* (1932) § 47.

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ing the equity of the court should be found out.”⁹⁸ Judge Story no less wisely took over this saying and applied it to defining of fraud.⁹⁹ But the subject incurred difficulties from ideas of the strict law coming over from the common-law action for deceit. The elements of a cause of action at law for deceit have been said to be five: “(1) the false representation, (2) knowledge of the person who made it of its falsity, (3) ignorance of the falsity by the person to whom it was made, (4) intention that it should be acted upon, (5) acting upon it with damage.”¹⁰⁰ But it was often added, and asserted to have the weight of authority behind it, that “representations are not actionable unless the hearer was justified in relying thereon in the exercise of common prudence and diligence.”¹⁰¹ This last is an echo of the reluctance of the strict law to help timid folks or fools. The requirements for (1) an action at law for damages, (2) an avoidance of a transaction for fraud, sought in a suit in equity for rescission or cancellation, or by an equitable defense in an action at law, and (3) denial of specific performance of a contract in equity, are not necessarily the same. This was brought out in the history of the common-law system by the sharp jurisdictional and procedural distinction between law and equity which put reparation of a wrong by deceit in one

98. *Lawley v. Hooper*, 3 Atk. 278, 279 (1745).

99. 1 Story, *Equity Jurisprudence* (1836) § 186.

100. 1 Bigelow, *Treatise on the Law of Fraud on its Civil Side* (1888) 466.

101. *Emery v. Third Nat. Bank*, 314 Pa. 544, 171 A. 881 (1934).

court and avoidance and equitable defense and denial of specific performance in another. Roman law made no such sharp jurisdictional distinction and so Roman jurists and civilians have sought a general definition since the time of Labeo (first century).¹⁰² The French Civil Code says: "Fraud (*le dol*) is a cause of nullity of the agreement when the manoeuvres practised by one of the parties are such that it is evident that, without these manoeuvres, the other party would not have contracted."¹⁰³ A standard text says of this: "Article 1116 presupposes that fraud consists of manoeuvres. The penal code employs the same word for swindling (*escroquerie*). But the lesser gravity of civil sanctions and care lest any act of bad faith be sanctioned had led to not demanding here manoeuvres independent of the act of deception itself."¹⁰⁴ Hence they say that fraud consists in (1) affirmative misrepresentations with or without fraudulent manoeuvres, or (2) manoeuvres consisting of disguising the reality of things under a false appearance, (3) in preventing a party from taking exact account of what he is doing, in (4) causing disappearance or keeping out of the way

102. "Any craft, deceit, or contrivance employed with intent to circumvent, or ensnare another." Dig. 4, 3, 2. Compare: "Fraud may be said to be the intentional determination of the will of another to a determination harmful to his interests by means of a representation which is neither true nor believed to be true by the person making it." Holland, *Jurisprudence* (13 ed. 1924) 239.

103. French Civil Code (1804) art. 1116.

104. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 200.

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documents or persons that could give counsel or information. (5) Even silence in that case might be a fraud and it is then called *réticence* (non-disclosure).¹⁰⁵ The German Civil Code, however, attempts no definition but merely says that a legal transaction induced by a misrepresentation intended to deceive is voidable at the option of the party deceived.¹⁰⁶ Perhaps the best definition is in the American Law Institute, Restatement of the Law of Contracts: "Fraud . . . means (a) misrepresentation known to be such or (b) concealment, or (c) non-disclosure where it is not privileged, by any person intending or expecting to cause a mistake by another to exist or to continue in order to induce the latter to enter into or refrain from entering into a transaction" ¹⁰⁷

Misrepresentation is said to be "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." ¹⁰⁸ In itself it has no consequences unless it induces another to act. The law in this connection is not seeking to punish a fault but to prevent unjust enrichment of one at another's expense.¹⁰⁹ This is brought out in the case of misrepresentation by a

105. Ibid.

106. German Civil Code, § 123(1).

107. American Law Institute, Restatement of the Law of Contracts (1932) § 471.

108. Ibid. § 470(1).

109. Ibid. p. 891(a).

third person. The Roman law made a distinction between duress and fraud.¹¹⁰ In case of duress there is defect of will where declared under coercion no matter who applied the coercion. But in case of fraud, as the ground of avoidance is unjust enrichment of the beneficiary of the transaction, if the latter did not make the representation, was not party to it nor knew or ought to have known of it and of its falsity, he is not unjustly enriched by obtaining performance.¹¹¹

It used to be said and is still sometimes repeated that the state of mind not in accord with the facts intended or expected to be created must be "material," that is, must be such as would take place in case of an ordinary, reasonable or prudent man.¹¹² But it is well established that cunning sharpers are not to be unjustly enriched at the expense of the foolish, gullible or careless.¹¹³

Also a distinction is often made between fact and opinion. But it has been well said that "an opinion is a fact and a statement of opinion is a statement of fact,

110. Dig. 44, 4, 4, 27.

111. American Law Institute, *Restatement of the law of Contracts* (1932) § 477; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 204; German Civil Code, § 123 II; Swiss Code of Obligations (rev. of 1911) art. 28, 1.

112. E. g. *Bundesen v. Lewis*, 368 Ill. 623, 15 N.E.2d 520 (1938); *Brim v. Couch*, 184 Ga. 310, 191 S.E. 94 (1937); *Williams v. Williams*, 220 N.C. 806, 18 S.E.2d 364 (1941).

113. American Law Institute, *Restatement of the Law of Contracts* (1932) § 571 i.

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namely, that the person making that statement holds that opinion.”¹¹⁴ It is not material, however, that is, is not considered as inducing action upon it unless made by “one who has or purports to have expert knowledge of the matter” or by “one whose statement is an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion.”¹¹⁵ But here, too, account must be taken of the security of transactions. Bargains are not to be set aside merely because one of the parties who has the best of the bargain has been enthusiastic in praise of his wares. As one of the five great Roman jurists of the third century put it, “in buying and selling it is naturally conceded to buy what is of more value for less and to sell of less value for more, and thus in turn for the parties to overreach each other.”¹¹⁶ Hence the law has made some allowance for “seller’s talk.”¹¹⁷

Of much more importance is concealment and non-disclosure. The French texts treat concealment under the head of “*fraudulent manœuvres*” within art. 1116 of the Civil Code.¹¹⁸ For Anglo-American law it is defined

114. Ibid. § 474 note to (a).

115. Ibid. 474.

116. Paul in Dig. 19, 2, 22, 3.

117. *Harvey v. Young*, Yelv. 21 (1602); *Davis v. Meeker*, 5 Johns. (N.Y.) 354 (1810); *Ireland v. Louis K. Liggett Co.*, 243 Mass. 243, 246, 137 N.E. 371 (1923). This is behind the cautious statement in American Law Institute, *Restatement of the Law of Contracts* (1932) § 474, comments (a) to (e).

118. 6 *Planiol et Ripert, Traité pratique de droit civil français* (1930) 200.

in the Restatement of the Law of Contracts as "any affirmative act likely to prevent or intended to prevent knowledge of a fact."¹¹⁹ Non-disclosure is called *réticence* in the French texts. It is defined as voluntarily keeping silence upon a fact which the other party would have an interest in knowing.¹²⁰ But it is only a ground of nullity where under the circumstances it amounts to an outright misrepresentation or in certain situations prescribed by rules of law, or where disclosure is called for by contract, as in application for insurance, cases of maritime assistance and salvage, and agency.¹²¹ German law "does not, like English law, single out special transactions as *uberimae fidei*, but determines, according to the circumstances of each particular case, whether non-disclosure is fraudulent or not."¹²² In Anglo-American law non-disclosure unless privileged has the effect of a material misrepresentation. One who is bargaining is not bound to tell the other party everything he knows, even if he is aware that the other is ignorant of the facts. But where there is such a relation between the parties as to justify the other in expecting that his interests will be cared for or there are special rules requiring disclosure, as in insurance and in suretyship, or the fact known by

119. American Law Institute, Restatement of the Law of Contracts (1932) § 471 comment (f).

120. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 210.

121. *Ibid.* pp. 261-262.

122. Schuster, *German Civil Law* (1907) 109.

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one party and not by the other is so vital that if the mistake were mutual the transaction would be voidable, non-disclosure of what is known to be unknown to the other party is fraudulent.¹²³

In Roman law the praetor allowed an equitable defence (*exceptio doli*) in case of fraud¹²⁴ and a penal *actio doli* where no other remedy was open.¹²⁵ In French law one who has been led into a mistake by fraud has an action of nullity.¹²⁶ If the transaction was had between more than two parties and only one was induced by fraud, that one only may seek annulment. If the object of the agreement was indivisible, the transaction is upheld as a whole. The victim of fraud is bound toward those who acted in good faith and has only an action for damages against the perpetrator of the fraud.¹²⁷ In Anglo-American law the remedies for fraud may be equitable or legal, i.e. historically in the Court of Chancery or in the common-law courts. The remedies in equity are cancellation (requiring an instrument by which the transaction promoted by fraud may be proved or asserted to be delivered up and cancelled), rescission (treating the transaction as of no

123. American Law Institute, Restatement of the Law of Contracts (1932) § 472 and note (b).

124. Dig. 44, 4, 4, 27.

125. Dig. 4, 3, 1, 4.

126. French Civil Code, art. 1304.

127. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) no. 206. Cf. American Law Institute, Restatement of the Law of Contracts (1932) § 487.

effect), and equitable defense. The remedy at law is the common-law action for damages—an action on the case for deceit.

Fraud may be such that there is no transaction at all as, for example, where one who has applied for life insurance induces another to impersonate him in taking the required medical examination before the company physician, whereupon the company issues a policy to the person impersonated believing it is insuring the impersonator. The policy is void. The company reasonably believed it was insuring the impersonator and the mistake as to the person insured was essential. There was no intention to insure the person impersonated. It is otherwise where there is intention to do what is done but the intention is induced by misrepresentation.¹²⁸

As relief in cases of avoidance for fraud is equitable certain conditions and bars of relief are required in order to maintain the security of transactions. Thus one who seeks avoidance must offer to do equity by returning what he has received under the transaction, must move promptly to avoid the transaction, and is barred by injurious change of position or innocent acquiring of rights by third parties who rely on the transaction.¹²⁹

Another type of remedy in Anglo-American law arises out of the discretion of the chancellor or court of equity as to decreeing specific performance of contracts in cases where the common-law remedy of damages is inadequate. Specific performance may be

¹²⁸. American Law Institute, *Restatement of the Law of Contracts* (1932) §§ 475-476.

¹²⁹. *Ibid.* §§ 480-484.

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denied, although the case does not come up to the full requirements of avoidance for fraud, in cases of a hard bargain coupled with sharp practice¹³⁰ or unfair conduct or mistake not in itself ground of avoidance.¹³¹

(e) *Qualifications*.¹ The declaration of will which produces a legal transaction may set limits in the way of making the transaction depend upon uncertain circumstances. The Pandectists distinguish condition (*condicio*), time (*dies*), charge (*modus*, *Auflage*²) and presupposition (*causa*, *Voraussetzung*).

(i) *Conditions*.³ Until Windscheid in 1862 jurists, following Pothier⁴ and Savigny⁵ had defined a

130. *Ellard v. Lord Llandaff*, 6 Ball & Beatty (Ir.) 241 (1810).

131. *Cadman v. Homer*, 18 Ves. 10 (1816); *Clermont v. Tasburgh*, 1 Jac. & W. 112 (1819).

1. Windscheid, *Pandekten* (9 ed. 1906) §§ 93-104; 1 Kohler, *Lehrbuch des deutschen bürgerlichen Rechts* (1905) §§ 249-252; Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) 360-384.

2. Schuster translates *Auflage* as "burden." German Civil Law (1907) 235, 578. But the idea of *modus* or *Auflage* is exactly expressed by the English legal term "charge." See the definition in *Merchants' Exchange Nat. Bank v. Commercial Warehouse Co.*, 49 N.Y. 635 (1872). In French law the term is *charge*. 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933) no. 272.

3. Salmond, *Jurisprudence* (1902) 285-287; Langdell, *Summary of the Law of Contracts* (2 ed. 1880) §§ 26-33; 3 Williams, *Treatise on the Law of Contracts* (rev. ed. 1936) chaps. 25-30; American Law Institute, *Restatement of the Law of Contracts* (1932) §§ 25-311; 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933) nos. 262-281; 3 Savigny, *System des heutigen römischen Rechts* (1840) §§ 116-124; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 86-95; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) § 249; Schuster, *Principles of German Civil Law* (1907) 110-114.

4. Pothier, *Traité des obligations* (1761) § 199. This was the Roman law definition, *Inst.* 3, 15, 6.

5. Savigny, *System des heutigen römischen Rechts* (1840) 121.

condition as an accessory provision which makes the operation of a declaration of will arbitrarily depend upon the occurrence or non-occurrence of a future uncertain event.⁶ But Windscheid gave up the requirement of a *future* event saying: "The circumstance upon which the condition is fixed may lie either in the past, or in the present, or in the future. If it lies in the past or in the present then its existence or non-existence and therewith the existence or non-existence of the willed legal effect is objectively fully secure, but in case of a declaration of will about it, it must also be subjectively unknown."⁷ This was followed by Holmes in 1881 who said: "Contracts are dealings between men, by which they make arrangements for the future. In making such arrangements the important thing is, not that it is objectively true, but what the parties know. Any present fact which is unknown to the parties is just as uncertain for the purposes of making an arrangement at this moment as any future fact."⁸ Pollock in his ninth edition changed to Windscheid's position, saying: ". . . the conception of conditional acts

6. 2 Puchta, *Cursus der Institutionen* (1881) 365; Czyhlarz, *Institutionen* (5 ed. 1902) § 20; Salkowski, *Institutionen* (4 ed. 1885) § 27 II; Sohm, *Institutionen des römischen Rechts* (17 ed. by Wenger, 1923) § 43; Capitant, *Introduction à l'étude du droit civil* (2 ed. 1901) 308; Schuster, *German Civil Law* (1907) § 111; 1 Dernburg, *Pandekten* (8 ed. 1911) § 95; Pollock, *Contracts* (2 ed. 1878) 375, and so in subsequent editions to and including the eighth (1911, pp. 452-457); Langdell, *Summary of the Law of Contracts* (2 ed. 1880) § 26; Holland, *Jurisprudence* (1 ed. 1811) 75, and so in all subsequent editions (see 13 ed. 1924, 175). But see French Civil Code, art. 1181. Patterson, *Constructive Conditions in Contracts* (1942) 42 *Columbia L.Rev.* 903.

7. 1 Windscheid, *Pandekten* (1 ed. 1862) 195—now in 9 ed. 1906, 457.

8. Holmes, *The Common Law* (1881) 304.

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in the law was formerly limited in the usage of learned authors to those which depend on a future contingent event assigned by the will of the parties. [Citing Pothier and Savigny.] This restriction is incompatible with the language and doctrine of our modern authorities and is not acceptable on its merits [quoting Holmes].”⁹ Williston argues that where the fact is not known to the parties they “look at the transaction as involving a promise subject to a condition because their knowledge will not be complete until the future, and the common law accepts that point of view.”¹⁰ The Restatement of Contracts adopts this.¹¹

Conditions are said to be precedent (the civilians say “suspensive”) or concurrent, or subsequent (the civilians say “resolutive”). A condition is precedent or suspensive if commencement of operation of the transaction is made to depend upon occurrence of the prescribed fact. It is subsequent or resolutive when termination of operation of the transaction is made to depend upon occurrence of the prescribed fact.¹² The civilian terms,

9. Pollock, *Contracts* (9 ed. 1921) 345. See also in 13 ed. by Winfield (1951) 273.

10. 3 Williston, *Contracts* (rev. ed. 1936) 1907.

11. American Law Institute, *Restatement of the Law of Contracts* (1932) § 291. See also *id.* § 250. In England, Windscheid's view was accepted by Sir William Rattigan, *Jurisprudence* (4 ed. 1919) § 61, and in America by Harri-man, *Contracts* (2 ed. 1901) 299; Ashley, *Contracts* (1911) § 57, and Costigan, *Conditions in Contracts*, 7 *Columbia Law Rev.* (1907) 151. See also Swiss Code of Obligations, art. 151.

12. Holland, *Jurisprudence* (13 ed. 1924) 125; American Law Institute, *Restatement of the Law of Contracts* (1932) § 250.

“suspensive” and “resolutive” more accurately describe these conditions.¹³ There are concurrent conditions in a bilateral transaction where performance on each side is a condition of the other. In truth each is a condition precedent. When there is performance on either side before or when it is due, it stands both for performance of a duty and as performance of a condition on which the duty of the other party depends. But either party may perform the condition on his side by making a tender, that is, by making an offer of performance, with manifest present ability to make it good if the other party perform at the same time.¹⁴

Perhaps the most interesting question in the law of conditions grows out of a rule of the Roman law which had its origin in the circumstances of a kin-organized society and had no application to the modern world, but having been incorporated in Justinian's Digest came into the law of Continental Europe and of the English ecclesiastical courts through the medieval universities. During the French Revolution legislation used the Roman texts to thwart reactionary testators and donors who sought to impose conditions upon gifts and legacies which were repugnant

13. The terms “precedent” and “subsequent” were taken over from the law of property where they refer to conditions to be fulfilled before the vesting of an estate or conditions operating after it has vested which when fulfilled divert it. Coke spoke of conditions that “create” and conditions that “destroy” an estate. *Co.Lit.* (1652) 219b. But the terms precedent and subsequent soon came into general use and were applied to covenants as well as to conveyances. *Large v. Cheshire*, 1 Vent. 147 (1667). As to the appropriateness of the terms commonly used in Anglo-American texts, see 3 Williston, *Contracts* (rev. ed. 1936) §§ 666-667A.

14. Langdell, *Summary of the Law of Contracts* (2 ed. 1880) § 32; American Law Institute, *Restatement of the Law of Contracts* (1932) § 257(a).

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to revolutionary ideas. Accordingly the Roman texts were extended to all so-called "liberalities," i.e. gifts *inter vivos* as well as legacies, in the French Civil Code. In the meantime in England, when equity through administration suits took over the administration of estates from the ecclesiastical courts, they took over the Roman law rule as part of the law which had been applied by those courts and brought into English and American law an unfortunate distinction between conditions precedent in devises of realty, governed by the common law, and in legacies of personalty, governed by the Roman law rule. The history of the anomalous rule of Roman law as to legacies upon impossible and illegal conditions precedent is instructive as to how legal precepts and doctrines can persist after the circumstances which gave rise to them have wholly changed and the reasons behind them have long ceased to exist.¹⁵

It violates the very conception of a legal transaction as something by which the law gives sanction and efficacy to the will of the parties expressed therein, to hold that in any sort of legal transaction a qualification of the expression of the will by a condition precedent may be separated from the remainder of the expression and the latter given legal efficacy apart from and divested of the qualification imposed upon it in its making and inception. Nor can it matter whether the legal transaction is bilateral, as in a contract, or unilateral as in case of a will. In either case the legal conception is that the will of the parties is given legal effect as a whole, if directed to a possible and legally permissible or recognizable result. Nor is there valid ground analytically for distinguishing the leaving of personal property by legacy from other legal transactions in this respect.

A rule treating impossible and illegal conditions precedent in testaments *pro non scripto* arose in Roman law because of

15. Pound, Legacies on Impossible or Illegal Conditions Precedent (1908) 3 Illinois Law Rev. 1.

Roman repugnance to intestacy. With the Romans originally it was a paramount object to keep up the family *sacra*.¹⁶ If the natural heir whom religion appointed to this duty was wanting, a testamentary heir was imperative. Otherwise there befell the calamity of discontinuity of the household. Failure of the appointment of the heir meant failure of the testament.¹⁷ So serious were the results, legal, and originally social and religious, of an impossible or illegal condition precedent in the institution of the heir, that legal principle gave way to *favor testamenti* and the impossible or illegal condition was treated *pro non scripto*.¹⁸ Where a legacy was given upon an impossible or illegal condition precedent there was for a time a controversy. The Proculians, who were inclined to analyse and criticise, held on principle that the legacy must fail just as a contract on such a condition would create no liability. The Sabinians, on the other hand, who were inclined to take the positions given by the history of the law, held that a legacy so given would stand, the impossible or illegal condition being held *pro non scripto*.¹⁹ Gaius, though a Sabinian, admitted that a good reason could hardly be given for a different rule in the case of legacies from the one governing other legal transactions.²⁰ The only reason seems to have been that legacies were governed by the analogy of the institution of the heir and the bad rule introduced for the latter case out of

16. "And concerning the *sacra* . . . there is the one opinion: that they are always to be preserved and handed down to households in succession and, to put it as a law, that the *sacra* be perpetual." Cicero, *De legibus*, ii, 19, 47.

17. In Roman law the purpose of a testament is to appoint an heir in place of the natural or statutory heir to succeed *en bloc* to the rights and liabilities of the testator. He is to be a universal successor and the legacies in the maturity of law are regarded as raising a quasi-contractual obligation as the heir after his entry upon the inheritance. Inst. 3, 37, 5.

18. Inst. 2, 14, 10; Dig. 25, 1, 3; Dig. 25, 1, 6.

19. Gaius, 3, 98.

20. Ibid.

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repugnance to intestacy came to be a general doctrine applicable to all testamentary dispositions. The view of the Sabinians was taken by the jurists of the third century and their texts were incorporated in Justinian's Digest.²¹

Any rule set forth in the *Corpus Iuris* was accepted in the civil law as a matter of course. But in the seventeenth and eighteenth centuries Roman law began to be thought of not as authority but as reason, and jurists of the law-of-nature school were not averse to using their own reason where the texts did not accord therewith. Some of the civilians, finding the rule in the *Corpus Iuris*, were content to cite the Digest as a sufficient reason.²² Some accepted it but pointed out its want of accord with principle and incongruity with the customary law of the time.²³ Some, finding no reasons for it in the Roman texts, resorted to the common juristic method of conjuring up reasons for it *ex post facto* and thus were able to keep it or some parts of it more or less alive. Voet, whose commentaries on the Pandects practically superseded the text in Roman Dutch law, undertook to give a reason for holding conditions precedent in testamentary dispositions *pro non scripto* when illegal or against good morals. He argues that in bilateral transactions an illegal or immoral condition represents an illegal or immoral intention of both parties. Hence the law wholly defeats the transaction. But in testamentary dispositions the illegal or immoral intention is that of the testator only. The legatee has no such intention. It is enough, therefore, to defeat the illegal or immoral intention of the testator.²⁴ But while policy may require that

21. Dig. 25, 5, 6; 30, 104, 1; 35, 1, 3; 35, 1, 6, 1; 38, 7, 14; 40, 7, 39, 4.

22. E. g. Domat, *Les lois civiles dans leur ordre naturel* (1689) liv. 3, tit. 1, sec. 8, no. 18, and liv. 4, tit. 2, sec. 9, no. 14, Strahan's transl. Cushing's ed. (1853) §§ 3230, 3637.

23. Vinnius, *Comm. on Inst.* 71, 14, 10, no. 3 (1692).

24. Voet, *Comm. in Pand.* xxxiii, 6, 2 (1698-1704).

the condition be thwarted, it does not necessarily require going further and making a disposition the maker did not intend. The true course is to hold the disposition itself ineffectual. Savigny made perhaps the most effective attempt to put reason behind the rule. A testator, he contends, would probably have made the same disposition even if he had known the condition could not or would not be allowed to operate because his chief object was to dispose of his property. But one engaged in a bilateral transaction is limiting the liability he assumes. So the limitation is quite as important to him as the promise.²⁵ In truth, Savigny's argument proceeds upon *favor testamenti*. Why should we try to save such fragments of the testator's scheme as we may unless we lean toward testacy? Today statutes of descent and distribution accord with the general moral sense. There is no occasion to strain legal principles in order to save testamentary dispositions.

While jurists were working out reasons for the Roman-law rule others, following a common juristic practice, were hedging it with exceptions.²⁶ The Code of Frederick the Great distinguished between an impossible condition precedent, and a condition *contra bonos mores* avoiding the legacy in the one case and holding the legacy absolute in the other.²⁷

But the Roman-law rule, which was showing signs of decay at the end of the eighteenth century, was given new life and extended application by the French Civil Code in 1804.²⁸ The

25. 3 Savigny, *System des heutigen römischen Rechts* (1840) § 124.

26. Pothier, *Pandectae Justinianae* (1748) xxv, 1, 26 et seq.; Thibaut, *Pandekten* (7 ed. 1828) §§ 802-803.

27. Pt. 2, bk. 2, tit. 37, § 4 (1749). This was followed in the Prussian *Landrecht* (1794) §§ 63, 504.

28. "In every disposition *inter vivos* or testamentary impossible conditions and those which are contrary to law or to morals shall be held not written." Art. 900.

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reason for the provision of that code was peculiar to revolutionary France. It had no real appeal elsewhere in itself but the general popularity of the code and its rapid spread over the civil-law world carried with it the extended rule it prescribed. We are told that it reproduces legislation enacted under the stress of the French Revolution. "Those who had overturned the constitution of France wished to assert the maxims of the new law and break down the resistance it encountered."²⁹ Barrère said: "Certain citizens being unable to yield to the principles of political equality and religious tolerance, proscribe in advance by transactions protected by law the exercise of public functions, the marriage of their children with plebians or those who practice a different religious cult" and went on to rail about government from the tomb by provisions in wills and conditions annexed to gifts and family settlements. Accordingly a law of 1791 provided that imperative or prohibitive conditions contrary to laws or to morals, as attacking religious liberty or freedom of marriage or of choosing a calling or profession or of exercising public functions, should be held for not written. The idea was to invalidate all provisions in testaments or gift transactions inspired by hostility to the Revolution. Article 400 of the Civil Code kept to the tradition of the Revolution.³⁰

French jurists came soon to feel the need of "tempering Article 900." There ceased to be fear of return of the old regime and the reasons which had inspired it lost their force. The text writers in seeking to evade it turned to the idea of separation of the condition from the conditioned gift, which had been used to explain and justify the rule of Roman law and sought to rest decision upon presupposition rather than condition—what was the presupposition of the transaction? Did the testator or donor

29. 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933) no. 269.

30. *Ibid.* It had been criticised from the beginning.

intend the condition as the basis of the transaction or did he intend the gift in any event? ³¹ Both the course of judicial decision and the course of text writing have used the idea of presupposition to "correct the exaggeration of Article 900." ³² But the theory of presuppositions instead of condition is justly criticized. ³³ It is at best a way out of the anomalous results of application of Article 900 according to its terms.

A number of countries which enacted codes in the nineteenth century followed the French Civil Code. ³⁴ Scotland received the Roman law as to legacies from the seventeenth-century civilians. ³⁵ On the other hand, the more recent codes have given the rule up. The German Civil Code makes one provision for conditions. ³⁶ The Swiss Civil Code provides that unlawful conditions or conditions against good morals make the disposition invalid. ³⁷ The Austrian Civil Code has but one provision applicable to all

31. 18 Demolombe, *Cours de Code Napoléon* (4 ed. 1869) no. 205.

32. 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933) no. 213, p. 279; 3 Colin et Capitant, *Cours élémentaire de droit civil français* (5 ed. 1927) 697; 9 Baudry-Lacantinerie et Colin, *Traité de droit civil* (3 ed. 1901) nos. 66 et seq.; 13 id. no. 752 (1902); Capitant, *De la cause des obligations* (3 ed. 1927); Jossierand, *Les mobiles dans les actes juridiques du droit privé* (1926) no. 135.

33. 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933) no. 272.

34. Italian Civil Code, art. 849; Spanish Civil Code, art. 792. See also the codes of Portugal, art. 1743, but omitted in the Civil Code of Brazil (1917); The Netherlands, art. 935; Mexico, arts. 3244, 3251; Chili, art. 1093. The Spanish Civil Code provides that conditions impossible or contrary to good moral shall "in no way prejudice the beneficiary." See also Civil Code of the Philippines, arts. 873, 874 (1949). Louisiana adopted the French Code provision. Louisiana Civil Code, art. 1519. Also Quebec, Civil Code, art. 760.

35. Bell, *Principles of the Law of Scotland* (10 ed. 1899) §§ 7785, 1883; Gloag and Henderson, *Introduction to the Law of Scotland* (4 ed. 1946) 533.

36. §§ 158, 2171.

37. Art. 482.

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legal transactions.³⁸ Also Professor Boissonade, who in his project of a code for Japan in general followed the French Code, rejected the doctrine of Article 900 entirely.³⁹ The Japanese Civil Code (1900) and Civil Code for China followed the German Code.

It remains to speak of the part played by the rule of Roman law in the common-law world.⁴⁰ In England, legacies were originally in the jurisdiction of the ecclesiastical courts. The medieval universities taught the canon law and the civil law side by side and each influenced the other. The canon law was confronted with the problem of impossible or immoral conditions precedent in cases of conditional betrothal. Its policy was to favor marriage and, putting the matter expressly on that ground, it held that impossible or immoral conditions precedent in betrothals *pro non scriptis* except in certain conditions so gross that assent to them vitiated the whole contract.⁴¹ The basis of the canon-law-rule was *favor matrimonii* as the original basis of the Roman-law rule was *favor testamenti*. In England, after the Reformation the ecclesiastical courts by custom administered the civil law as taught in the universities. When legacies came within the jurisdiction of the Court of Chancery it naturally took over the doctrines of the civil law on that subject. Although the courts later have pointed out that the civil law with respect to

38. Allgemeine BGB § 698.

39. *Motifs de code civil du Japon* (1889) art. 642. It should be added that English lawyers in codifying English law for India rejected the civil-law rule and subjected legacies to the common-law rule. Indian Succession Act, § 14.

40. 2 Jarman, Wills (7 ed. 1930) 1443-1444; 1 Roper, Legacies (4 ed. 1847) 744-766; 2 Williams, Executors (13 ed. 1953) §§ 1042, 1045; Pound, Legacies on Impossible or Illegal Conditions Precedent (1908) 3 Illinois Law Rev. 1, 13-23; Simes, The Effect of Impossibility Upon Conditions in Wills (1936) 34 Michigan Law Rev. 509, 928-936.

41. Decretals of Gregory IX, liv. 4, tit. 5, cap. 7 (1227-1234), 2 Corpus Juris Canonici (ed. Friedberg, 1881) 683.

legacies was binding only so far as the courts of equity had adopted it,⁴² yet the Roman law as expounded by the seventeenth and eighteenth-century civilians was much in vogue in eighteenth-century England and the rule of the Roman law as they expounded it became the rule of English equity.⁴³ It still stands as stated in 1758.⁴⁴ A devise of real estate upon an impossible condition precedent will fail. It is governed by the common law. But where a condition precedent to a legacy of personalty is impossible the rule of the civil law prevails and the legatee will take as if the legacy was unconditional.⁴⁵ This, however, is much qualified by considerations of the motive of the testator and his knowledge as to impossibility of the condition.⁴⁶ If the legacy is given upon an illegal condition precedent, a distinction based on the reasoning of the law of nature civilians was drawn in *Lowther v. Cavendish*⁴⁷ and is adhered to. If the condition requires something *malum in se* both condition and gift will fail.⁴⁸ But if the condition is considered not *malum in se* but only against a rule of law, the condition only will fail. The legacy will stand. In the civil law a distinction is taken between what is *malum in se* and what is *malum prohibitum*.⁴⁹

As to the law in the United States, the Field draft code had the provision: "Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is ful-

42. Jessel, M. R. in *Bellairs v. Bellairs*, L.R. 18 Eq. 510, 514 (1874); In *re Moore*, 29 Ch.D. 116, 129 (1885).

43. *Lowther v. Cavendish*, 1 Eden 199 (1758).

44. 2 *Jarman, Wills* (7 ed. 1930) 1443-1444; 2 *Williams, Executors* (13 ed. 1953) 682, 683.

45. *Re Thomas's Will Trusts*, [1930] 2 Ch. 67.

46. 2 *Williams, Executors* (13 ed. 1953) 682-683.

47. *Supra*, note 43.

48. In *re Moore*, 29 Ch.D. 116, [1886].

49. In *re Elliott*, [1952] 1 Ch. 217, 222.

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filled; except where such fulfilment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.”⁵⁰ This curious provision, covering devises of realty as well as legacies of personalty, dealing only as to impossible conditions, leaving illegal conditions and conditions *contra bonos mores* unprovided for, and calling for arguing as to the “sole motive” of a testamentary provision, has been adopted by legislation in California, Montana, North Dakota, Oklahoma, South Dakota and Utah.⁵¹ As to the course of judicial decision, the English rules are approved in their entirety in two cases in the lower courts in New York.⁵² Professor Simes concludes rightly that in case of a legacy on a condition precedent, impossible at the time of the testator’s death, it is difficult to say whether courts will uphold it on the ground that impossibility excuses and so the gift is absolute. But, he adds, “in the absence of statute, neither reason nor authority compels the recognition by American courts of such a rule.”⁵³ As to illegal conditions or conditions *contra bonos mores* there is some American authority accepting the civilian rule as adopted by the English courts of equity.⁵⁴ But much of what is cited ignores important distinctions. In one case where there was a devise of land upon condition precedent against good morals a court held the condition

50. Ninth Report of the New York Commissioners of the Code. Civil Code (1865) § 609.

51. California Probate Code, § 142; 2 Montana Rev.Code, § 7046; 1 North Dakota Comp.Laws, § 5715; 1 Oklahoma Stats. § 1609; 1 South Dakota Comp. Laws, § 673; Utah Rev.Stats. 101-2-31.

52. Matter of Haight, 51 App.Div. 310, 314-316, 64 N.Y.S. 1029 (1900); Potter v. McAlpine, 3 Dem. 108, 124-125, [1885].

53. Simes, The Effect of Impossibility Upon Conditions in Wills (1936) 34 Michigan Law Rev. 909, 936.

54. Dusbiber v. Melville, 178 Mich. 601, 603, 146 N.W. 208, 209, 51 L.R.A., N.S., 367 (1914); Dwyer v. Kuchler, 116 N.J.Eq. 426, 174 A. 154 (1934).

void and upheld the devise.⁵⁵ The general confusion to which the doctrine of taking conditions precedent *pro non scriptis* has led everywhere, happily has very few parallels in the law.

The long persistence in the modern world of this product of original Roman repugnance to intestacy is a striking example of the extent to which law may be a government of the living by the dead. Partly it must be ascribed to the hold which Roman law has had upon all systems, which gives to every Roman juristic idea "some modern copy or survival inexplicable without the original."⁵⁶ Partly the specious reasons with which the civilians bolstered it up succeeded in hiding to some extent its conflict with principle. Partly the analogical extension by the classical jurists of a rule governing institution of the heir to legacies, the taking up of that rule by the civilians and the reception of it by the English Court of Chancery must be laid to that "officious kindness"⁵⁷ characteristic of the formative period of equity in both systems which tries to make men's dispositions over for them and to enforce for them what the praetor or chancellor thinks they would have liked to do.

(ii) Time (*dies*).⁵⁸ A legal transaction may provide that its effects are to begin or to come to an end

55. *Hawke v. Euyart*, 30 Neb. 149, 160, 46 N.W. 422, 425 (1890).

56. *Clark, Practical Jurisprudence* (1883) 267.

57. *James, L. J. in Lambe v. Eames*, 6 Ch.App. 597, 599 (1875).

58. *Walker, American Law* (11 ed. 1905) § 22; *Capitant, Introduction à l'étude du droit civil* (4 ed. 1923) nos. 322-329; 1 *Windscheid, Pandekten* (9 ed.

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after the lapse of a specified period of time. The civilians used to distinguish *dies certus* and *dies incertus*—a certain time provision and an uncertain time provision. Modern usage distinguishes *dies certus an incertus quando*—certain whether, uncertain when—and *incertus an incertus quando*—uncertain whether, uncertain when. An example of the former is a provision to take effect on the death of X. An example of the latter is a provision to take effect on the marriage of Y. X is sure to die, but the date is uncertain. It is not certain that Y will ever marry or if he does when it will be. If there is a gift to Y when he comes of age, while the date of coming of age is fixed with reference to the date of his birth, it is uncertain whether he will live to come of age. Where it is uncertain whether the end of the period fixed will ever be attained, e.g. whether Y will live to come of age, there is really a condition rather than a time-provision. On the other hand, there is a time-provision in the strict sense where it is certain that the transaction will become operative or cease to be operative at the end of the time or on the event prescribed. When there is *dies certus an incertus quando*, as in case of a transaction operative at the death of X, there is a true time-provision.⁵⁹

1906) §§ 90, 96a. 1 Dernburg, Pandekten (8 ed. 1911) §§ 101–102; 3 Savigny, System des heutigen römischen Rechts (1840) §§ 125–127; Schuster, German Civil Law (1907) § 108.

59. 1 Windscheid, Pandekten (9 ed. 1906) § 96a, notes 5, 6, 7. Where rights are to come into existence at a wholly uncertain time the postponement is a condition. 1 Dernburg, Pandekten (8 ed. 1911) § 112, ¶ 3.

Where no time is fixed and instant operation is not practicable, a reasonable time is understood. What is a reasonable time is a question of fact, depending on the nature of the transaction, the usages of business and the circumstances known or which ought to be known to the parties.⁶⁰ But one who imposes a time-provision may fix any time he wishes. He is not bound to make it a reasonable one.⁶¹

In Roman law certain legal transactions did not admit of time-provisions or conditions. These were emancipation, acceptilation (formal release of a formal contract), entrance on an inheritance, choice of a slave (where a testator gave a legatee his choice out of a number), and choice of a tutor.⁶² Addition of a time-provision or condition wholly vitiated the transaction. In some of these cases the nature of the transaction precluded time-provisions or conditions. In the case of acceptilation the form did not admit of them. Some legal relations involve a purely temporary operation. Such are hiring, mandate (bailment), partnership, usufruct (life estate). Provision for a limit of termination is in accord with

60. American Law Institute, Restatement of the Law of Contracts (1932) § 40(2).

61. *Ibid.* comment (a).

62. Dig. 50, 17, 77. But where an heir was named to take subject to a condition as to time the institution of the heir was valid but the provision as to time was treated *pro non scripto*. Dig. 28, 3, 34.

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their nature. It limits the legal relation but has nothing to do with claims growing out of the relation.⁶³

Roman law held limits of termination repugnant to rights of ownership. The classical law only permitted contracts whereby one who acquired the right obligated himself personally to restore the property after a certain time.⁶⁴ But Justinian gave direct resolatory force to limits of ownership.⁶⁵ A like question has arisen in Anglo-American law as to gifts or bequests of chattels personal for life.⁶⁶ Gray says justly that "there is no reason why the use and occupation of a chattel personal cannot be given for life."⁶⁷

In Anglo-American law a bargain to limit unreasonably the time within which a possible future claim may be asserted is illegal.⁶⁸

As to the mode of reckoning, Kohler says rightly that above all time belongs to the unlogical elements of the law.⁶⁹ It has generally been recognized that rules for computing time are arbitrary.⁷⁰ Few of the rules

63. 1 Dernburg, Pandekten (8 ed. 1911) § 102, ¶ 4.

64. Fragm.Vat. § 283, Girard, Textes de droit romain (6 ed. 1937) 581.

65. Cod. 6, 37, 26; id. 8, 54, 2.

66. Gray, Rule Against Perpetuities (2 ed. 1942) §§ 821-856.

67. Ibid. § 855.

68. America Law Institute, Restatement of the Law of Contracts (1932) § 558.

69. 1 Kohler, Lehrbuch des bürgerlichen Rechts (1906) 232.

70. Aultman & Taylor Co. v. Syme, 163 N.Y. 54, 58, 57 N.E. 168, 170 (1900).

that have been laid down at one time or another have had universal application.⁷¹ But as a general proposition a distinction is made between a period of time and a point of time. A period of time cannot well be reckoned from moment to moment. The least period of which notice is taken is the day. There is an old saying that the law does not regard fractions of a day.⁷² This is true when only a period of time is in question.⁷³ But when, as in case controversies over priorities are to be decided, a point of time may be decisive, the maxim is disregarded.⁷⁴ But in civil law jurisdictions in which the first and last days of a period are both counted it is laid down that when the beginning is on a small fraction of a day the next full day is to be counted as the first.⁷⁵ French law also has a maxim *dies a quo non computator in termino* which applies when the event which is the point of departure oc-

71. German Civil Code (1900) § 108.

72. Co.Lit. 135b (1628); *Field v. Jones*, 9 East 151, 154 (1807).

73. *Lester v. Garland*, 15 Ves.Jr., 249, 257 (1808).

74. In *Combe v. Piff*, 3 Burr. 1423, 1424 (1763) Lord Mansfield said: "But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too where it is necessary and can be done; for it is not like a mathematical point which cannot be divided." The question was as to priority of proceedings pending on the same day. See also *Township of Louisville v. Portsmouth Savings Bank*, 104 U.S. 469, 474-478, 26 L.Ed. 775 (1881), question of priority of taking effect of a constitution on an election at which the polls closed at sunset and a vote at a town meeting held at 9 A. M. at which 54 votes were cast.

75. German Civil Code, § 187; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) 233.

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curs on the first day of the period so as to make it a fraction of a day.⁷⁶ In the common-law world the general rule in reckoning a period of time is to exclude the first day—the day of the act done or event happening.⁷⁷

There has been much legislation in all jurisdictions going into a great deal of detail but seldom yielding any principles.⁷⁸

(iii) Charge or burden (*modus*).⁷⁹ Charge (*Auflage*) is the encumbering of a right gratuitously bestowed by a duty of some performance. The disposition is not dependent upon performance of the imposed duty, but the duty is enforceable, may be the subject of a suit, and may be secured by lien, pledge or surety. It is related to suspensive or precedent condition. But the two provisions attain their ends in different ways. A condition suspends. A *modus* or charge binds. A suspensive

76. Capitane, Introduction à l'étude de droit civil (4 ed. 1923) no. 324.

77. Lester v. Garland, 15 Ves.Jr. 248, 251 (1808). See the full statement as to special rules as to periods of time in English law in 2 Blackstone, Commentaries on the Laws of England (1765) 146, note 3 to Chitty's ed. (1826), reprinted in Lewis's ed. (1915) 603–605. As to periods of terms in leases, see Co.Lit. 46b (1628), and 4 Kent, Commentaries on American Law (1836) 95 note. As to intervening holidays, see: England, Bills of Exchange Act, 1882, § 14(11); United States, Uniform Commercial Code (1952) § 3–503. As to days and months, see Walker, American Law (9 ed. 1905) 65.

78. As to the time of taking effect of statutes, see England, Statutes (Definition of Time) Act, 1880.

79. Mitteis, Römisches Privatrecht (1908) § 12; 3 Pernice, Labeo (1892) 1–44; 3 Savigny, System des heutigen römischen Rechts (1840) §§ 128–129; 1 Windscheid, Pandekten (9 ed. 1906) § 97, n. 1; 1 Dernburg, Pandekten (8 ed. 1911) § 103; Capitane, De la cause des obligations (3 ed. 1927) nos. 201–202; 1 Scott, Law of Trusts (1939) §§ 10, 10–1.

condition exerts the stronger pressure since the transaction only takes effect if the person entitled upon condition performs the acts required of him. But this may lead to making the transaction wholly nugatory. For example, in a legacy upon condition precedent the legatee may die before he can perform the act imposed by way of condition. If a charge be imposed instead, the disposition will remain legally effective although performance was impossible from the beginning, or became impossible subsequently without fault of the person upon whom the charge was imposed, or is contrary to good morals. In case of doubt, a provision is taken to be a charge, not a suspensive condition.

The term *modus* was adopted by the Pandectists for charge. But although the conception was understood by the Roman jurists the term was little used by the classical writers in this sense.⁸⁰ It was taken from the rubric of a title of the Digest and seems to have been used in the teaching of the law schools of the earlier Byzantine era.⁸¹ Windscheid includes charge (*modus*) under presupposition (*causa*) holding that the distinction proceeds from an economic instead of a juristic point of view, i.e. looks to the effect of the qualification of the gift from the point of view of the value of the gift to the beneficiary instead of from its operation as qualifying the will of the giver.⁸²

80. Only Gaius, Dig. 35, 1, 17, 4, and Ulpian, Dig. 37, 5, 3, 6.

81. 3 Pernice, Labeo (1892) 12.

82. 1 Pandekten (9 ed. 1906) § 97, n. 1.

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But terminology and classification are useful instruments to be developed and valued for the extent to which they help in understanding and applying legal precepts more than for their logical derivation from juristic conceptions. Moreover, the term “charge” is useful in the treatment of the Anglo-American law as to legacies while the term “consideration” which the common-law lawyer uses for presupposition is overburdened without extending it to “charges.” The German civil law uses the term “gift subject to a burden” (*Schenkung unter Auflage*) and lays down rules as to the beneficiaries, enforcement, renouncing by the beneficiary, and revocation by the giver.⁸³

On account of the difficulties raised by Article 900 of the French Civil Code, the French text writers are at pains to distinguish between condition and charge. As charge involves an obligation to do or to give whereas condition leaves full liberty to the beneficiary, where there is a condition Article 900 would apply and only the condition might fail, but in case of a charge Article 954 could be applied and the whole transaction caused to fail. It is said: “Wherever we have to do with a disposition subject to a charge, non-performance of a charge which is unlawful, contrary to morals, or impossible, results in entire failure of the transaction, contrary to Article 900.” Hence a struggle to make charge out of condition or to put both under *cause* (presupposition) so as to avoid sep-

83. Schuster, German Civil Law (1907) § 204.

aration of the qualification from the transaction qualified.⁸⁴ Josserand puts the case of a gift to a widow so long as she remains unmarried. Is there here, he asks, *modus*, obligation of remaining unmarried, or resolutory condition broken by remarriage? Termination of a gift for breach of a resolutory condition is automatic while in French law revocation of a gift for non-performance of a charge is "judicial"—i.e. requires a legal proceeding.⁸⁵ He approves⁸⁶ the result reached by Capitant, who says: "The courts enjoy a sovereign power of valuing in order to decide whether the charge has or has not, according to the formula they have adopted, been the impelling cause of the gift."⁸⁷ What was the impelling cause, separating the qualification from the gift, is treated by the French as a question of fact, wholly for the tribunal of first instance, "calling for a psychological investigation," which "strives to penetrate the reasons which determined the person making the disposition to impose a charge."⁸⁸ This has been deservedly criticised, not on the ground argued by Windscheid, but as leaving the law too much at

84. 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933) no.

85. Josserand, *Les mobiles dans les actes juridiques du droit privé* (1928) no. 135, pp. 176-177.

86. *Ibid.*

87. Capitant, *De la cause des obligations* (3 ed. 1927) no. 210.

88. Josserand, *Les mobiles dans les actes juridiques du droit privé* (1928) no. 137.

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large.⁸⁹ It has been required by the confused code provisions as to conditions.

In Anglo-American law the purposes of a charge are achieved in part by creating or imposing a trust, something peculiar to the common-law system, and partly, in the law of wills, by imposing charges upon devises and legacies. The difference between trust and charge is well put by Scott: "An equitable charge is like a trust in that in each case the legal title to property is vested in one person and an equitable interest in the property is given to another. The interest which the equitable encumbrancer has, however, is different from the interest of a beneficiary of a trust. The equitable encumbrancer has only a security interest in the property; the beneficiary of a trust is, to the extent of his beneficial interest, the equitable owner of the trust property. If a devisee subject to an equitable charge fails to pay the equitable encumbrancer the sum to which he is entitled, the latter's remedy is a suit in equity to obtain a decree for the sale of the land to pay the charge; if a trustee fails to perform his duties under the trust, the remedy of the beneficiary is a suit in equity to compel specific performance or redress of the breach of trust. . . . If property is transferred in trust for a particular purpose and the purpose is fully accomplished without exhausting the trust property, the

89. 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933) no. 272, p. 277.

trustee cannot keep the trust property for his own benefit, but holds it upon a resulting trust for the settlor or his estate, unless by the terms of the trust the settlor manifests an intention that the trustee in such case should keep the property. In the case of an equitable charge, on the other hand, if the amount of the charge is paid, the person who holds subject to the charge can keep the property for his own benefit.”⁹⁰ Professor Scott speaks of a devise of real property subject to a charge. But the distinction and the rules as to charges upon testamentary gifts are applicable to both devises of realty and legacies of personalty.⁹¹

(iv) Presupposition (*causa, cause, Voraussetzung*).⁹² Qualifications of legal transactions by express conditions, time limitations, and charges are imposed by the will of the parties. But the law may impose qualifications in the way of implied or constructive conditions, and of presuppositions. Implied conditions may be implied in fact, that is, ascertained by genuine interpretation of

90. 1 Scott, *Trusts* (1939) § 10. Citing *King v. Denison*, 1 Vesey & Beames (1813) 260.

91. *Potter v. Gardner*, 12 Wheat. (U.S.) 498, 6 L.Ed. 706 (1827)—land; *Boal v. Matropolitan Museum*, 298 F. 894 (C.C.A.2d 1924)—personalty; *Thayer v. Finnegan*, 134 Mass. 62 (1883)—land; *Howells State Bank v. Pont*, 113 Neb. 181, 202 N.W. 457 (1925).

92. 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 97–99; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) § 251; 2 Demogue, *Traité des obligations en général* (1923) chap. 14; Capitant, *De la cause des obligations* (3 ed. 1927); Jossierand, *Les mobiles dans les actes juridiques du droit privé* (1928) nos. 108–170; 7 Williston, *Contracts* (rev. ed. 1938) chap. 58.

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the express terms of a transaction or "implied in law," that is, not really involved in the actual transaction and found by genuine interpretation but imposed by law. So-called conditions imposed by law as equitable defenses in order to achieve just results are better called constructive conditions.⁹³ Likewise the law may qualify transactions with reference to their presuppositions in order to attain just results, i.e. results to accord with the reasonable expectations of the actors. As Kohler puts it, the distinction between condition and presupposition has full justification in the circumstances of life. When in entering into a transaction there is doubt as to events which may affect its terms a condition is imposed. But where there was no doubt nevertheless unforeseen and not reasonably foreseeable events may thwart the reasonable purposes on which the transaction was framed.⁹⁴ In such a case the law may inquire as to the security of transactions. Windscheid describes presupposition as undeveloped condition. He explains that the willed legal transaction was expected to operate under certain circumstances believed reasonably to be known and being supposedly known were not made an express condition. But the presupposed reasonable expectations can be asserted by way of an equitable defense.⁹⁵ Demogue brings

93. American Law Institute, *Restatement of the Law of Contracts* (1932) § 253, 267 comment (a).

94. 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) 570.

95. 1 Windscheid, *Pandekten* (9 ed. 1906) 507-510.

out how this is reconciled with the security of transactions by distinguishing between motive, which has to do with remote result, and presupposition, which has to do with the immediate result.⁹⁶ If the actor wishes to assure his motive he must impose a condition.

Unfortunately the subject of presupposition has been much confused by the use of *causa*, *cause*, in the law of Continental Europe as a means of holding to the rule of Roman law that no duty arises from a bare agreement.⁹⁷ Both the term "consideration" in Anglo-American law⁹⁸ and *cause* in the French texts⁹⁹ have acquired a variety of meanings which deprives each of much value for analytical jurisprudence. Another source of confusion in French law has been use of the term to enable escape from the bad results of application of Art. 900 of the French Civil Code.¹⁰⁰ Neither term is useful for critical exposition. But it is not easy to set forth the actual state of the law without cautious employment of them.

96. 2 Demogue, *Traité des obligations en général* (1923) 546-547.

97. I have discussed this at length in a paper, *Individual Interests of Substance—Promised Advantages* (1945) 59 *Harvard Law Rev.* 22-41.

98. Pound, *Consideration in Equity*, (1919) 13 *Illinois Law Rev.* 667, 668, 687-692.

99. "Doctrine [i. 3. the course of exposition by teachers and commentators] is swallowed up in an interminable and sterile controversy about the reality of *cause*, exposition of which is the chief object of the discussion which the treatise devote to this subject." Capitant, *De la cause des obligations* (3 ed. 1927) 9.

100. 5 Planiol et Ripert, *Traité pratique de droit civil français* (1933).

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In Anglo-American law the idea of presupposition is important in the law of contracts in connection with "failure of consideration,"¹⁰¹ impossibility of performance,¹⁰² and frustration.¹⁰³

§ 129. WRONGFUL ACTS.¹ We are concerned here only with will acts—willed action—not with the modern law of torts as a whole. Substantially the whole of the law of contracts, even today in the time of standard contracts and standard clauses and collective bargaining,

101. American Law Institute, Restatement of the Law of Contracts (1932) §§ 274-290; id. Restatement of the Law of Restitution (1937) §§ 15g, 175f.

102. 7 Williston, Law of Contracts (rev. ed. 1938) § 1931.

103. American Law Institute, Restatement of the Law of Contracts (1932) § 288.

1. Pound, Introduction to the Philosophy of Law (rev. ed. 1954) chap. 4; id. The Rule of the Will in Law (1954) 68 Harvard Law Rev. 1, 17-19; Holmes, Common Law (1881) lects. 3, 4; Holland, Jurisprudence (13 ed. 1924) 329-334; Salmond, Essays in Jurisprudence and Legal History, The Principles of Civil Liability (1891) 123-170; id. Jurisprudence (1902) §§ 133-141; Paton, Jurisprudence (2 ed. 1951) §§ 100-105; Friedmann, Legal Theory (1947) 291-293; id. Law and Social Change in Contemporary Britain (1951) chap. 4; Keeton, Elementary Principles of Jurisprudence (2 ed. 1949) 218-224; Lundstedt, The General Principles of Legal Liability in Different Legal Systems (1934) 2 II Acta Academiæ Universalis Jurisprudentiæ Comparatiuæ, 367-411; Duguit, Les transformations générales du droit depuis le Code Napoléon (1912) chap. 5, translated in 11 Continental Legal History Series, The Progress of Continental Law in the Nineteenth Century (1918); 5 Demogue, *Traité des obligations en général* (1923) 1-5; id. Fault, Risk, and Apportionment of Loss in Responsibility (1921) 15 Illinois Law Rev. 369; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 475-483; Hasse, *Die Culpa des römischen Rechts* (2 ed. 1839); 1 Binding, *Die Normen und ihre Uebertretung* (1872) § 58; 2 id. (2 ed. 1914) §§ 76-91; Schuster, *German Civil Law* (1907) 151-153, 155-157, 334-349; Rümelin, *Schadenersatz ohne Verschulden* (1910); Thayer, *Liability Without Fault* (1916) 29 Harvard Law Rev. 801; Smith, *Tort and Absolute Liability* (1917) 241, 319, 409; Isaacs, *Fault and Liability* (1918) 31 Harvard Law Rev. 954.

comes within the scope of the theory of acts since no one is bound to enter into the standard contract or the contract with the standard clauses and his side of the contract is voluntary. Also the collective bargain presupposes a relation of employer and employee which is created by contract. Not so in the law of torts, the law of liability to repair injuries for which individuals are held responsible.²

It is true much of the older part of the law of torts, the part treating of the named wrongs, wrongful appropriation of property, injuries to the physical person, and injuries to corporeal property—going on the principle that in civilized society men must be able to assume that others will commit no intentional aggressions upon them, and its modern corollary that one who does anything which is on its face injurious to another must repair the resulting damage unless he can justify or assert a legally recognized privilege—this part is within the theory of an act. So too, to some extent, is liability for negligent injury to person or property—imposing an unreasonable risk upon another's person or property whereby either is injured—while carrying on some course of conduct. This is by no means all of the law of negligence. But in that part of the law of torts going on the principle that in civilized society men must be able to assume that others will act reasonably and prudently so as not by want of

2. See *post*, chap. 32.

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due care under the circumstances to subject them to unreasonable risk of injury, it is assimilated to the law as to intentional aggression by means of an idea of culpable conduct which may be either intentional or negligent. Negligence is a very broad term. It covers conduct so unreasonably reckless as to be indistinguishable from intentional aggression, but on the other hand covers want of a very high degree of diligence, hard to attain, in the keeping of dangerous things or operation of dangerous machinery where even good intentions are no excuse. The development of industrial society, the growth of crowded urban communities, and invention of mechanical contrivances for every activity of daily life, entailing continued and innumerable threats to the general security, have extended the scope of the principle of negligence far beyond what may fairly be called morally blameworthy conduct. As things are today, in civilized society men must be able to assume that those who maintain things or employ agents or agencies having a natural tendency to get out of hand and beyond the boundaries of their proper employment, will restrain them or keep them within their proper bounds. This takes us far from a theory of wrongful acts. Hence in the present connection we are not talking of the more important part of the law of torts. The ideas with which we must deal are fault and causation and in connection with fault (i) acts of intentional aggression, (ii) culpably negligent conduct, (iii) vicarious liability, and (iv) the role of fault in tort liability.

1. *Fault*.³ Liability to repair injury is imposed: (1) To secure against intentional aggression, (2) to secure against imposition of unreasonable risks upon others under the conditions of life in the time and place, and (3) to secure against the operation of agencies and instrumentalities of danger to others correlative to the power to control them.

(i) *Intentional aggression*. In a simple pioneer or agricultural society the threat to the general security is in intentional aggression. Hence Roman law and the common law begin with a series of named and specifically defined wrongs: In Roman law, intentional injury to the physical person or to honor (*inuria*), wrongful appropriation of property (*furtum*), injury to corporeal property (*damnum inuria datum*);⁴ in the common law, assault and battery, imprisonment, trespass upon possession of land or chattels, conversion of chattels, defamation.⁵ These set a pattern for security against types of injury which became important threats to the general security in later development of civilized society.

3. 1 Austin, *Jurisprudence* (5 ed. 1885) lects. 20-23; Holmes, *Common Law* (1881) 107-112; id. *Privilege, Malice and Intent* (1899) 8 *Harvard Law Rev.* 1; Ames, *Law and Morals* (1908) 22 *Harvard Law Rev.* 97, 104-114; Wigmore, *The Tripartite Division of the Law of Torts* (1894) 8 *Harvard Law Rev.* 200; id. *Summary of the Law of Torts* (in 2 *Select Cases on the Law of Torts* (1912) §§ 10-22, 150-173; 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 505-511; 2 Windscheid, *Pandekten* (1906) §§ 451-461; Schuster, *Principles of German Civil Law* (1907) § 284.

4. Inst. 4, 4; 4, 1 pr. and 1-5; 4, 3.

5. 3 Blackstone, *Commentaries on the Laws of England* (1768) 119-138, 149-153, 167-172, 208-215.

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(ii) Negligence.⁶ With social and economic progress intentional aggression ceases to be a staple phenomenon and a chief threat to the general security comes to be in the way in which men do things in themselves not harmful. The general security is threatened by their carrying on items of their daily activities in such a way as, without intention to harm others, to subject others to an unreasonable risk of injury from which harm results.

Aquilian *culpa* in Roman law⁷ was the basis of development of a law of negligence in Continental Europe. The significant development began in the seventeenth century. That was the era of the law-of-nature school of jurists⁸ who held that reason could furnish a complete apparatus of rules of law, good for all times, places, and men. What reason pointed out as right was law because it was right. Rules of law were applications of moral or ethical propositions of incontestable universal validity. The classical statement of the principle of tort liability in this stage of development is in the French Civil Code: "Every act of one which causes damage to another, obliges him through whose fault it happened to repair it."⁹ Thus

6. Terry, Negligence (1915) 29 Harvard Law Rev. 40; Salmond, Jurisprudence (1 ed. 1902) §§ 141-145; Wigmore, Summary of the Law of Torts (2 Select Cases on The Law of Torts (1912) §§ 170-172); 1 Beven, Negligence (3 ed. 1908) chap. 1.

7. Inst. 4, 3 (*de lege Aquilia*); Dig. 9, 2 (*ad legem Aquilianam*); Cod. 3, 35 (*de lege Aquilia*); Grueber, The Roman Law of Damage to Property (1886).

8. *Ante*, chap. 1, § 7.

9. French Civil Code (1804) art. 1382.

there are two elements of liability: (1) fault, (2) causation of damage. Fault was taken to be moral fault. It was an ethical theory. But it had to be recognized that the social interest in the general security had to be looked to as the basis of the legal theory of liability rather than the interest in the general morals. As Holmes put it, liability to an action does not necessarily import wrongdoing: “. . . experience is the test by which it is decided whether the degree of danger attending given conduct under given known circumstances is sufficient to throw the risk upon the party pursuing it.” He preferred to use the term “blameworthiness” instead of “fault.” Imposition of an unreasonable risk of injury upon others resulting in harm to them was legally blameworthy even if no moral element was involved.¹⁰

(iii) This is brought out especially in case of what is called “vicarious liability”—cases in which one is held by law for the damage done another by the “fault” of his agent or servant.¹¹ Holmes showed that the face of the theory of fault-liability in the common-law system was saved by a fiction of identifying the master and servant, employer and employee, principal and agent, so that what was done wrongfully by servant or agent was held to have

10. Holmes, *The Common Law* (1881) 149.

11. Baty, *Vicarious Liability* (1916); Terry, *Leading, Principles of Anglo-American Law* (1884) §§ 87-88; Salmond, *Jurisprudence* (1 ed. 1902) § 149; Holmes, *Agency* (1891) 4 *Harvard Law Rev.* 345; Seavey, *Speculation as to Respondeat Superior* (1934) *Harvard Legal Essays* 433.

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been done by master or principal. The real basis of liability here is the threat to the general security in the employment of agents and agencies which in ordinary experience may get out of hand and work harm. The master or employer or principal may have chosen servant or employee or agent with all care, given him excellent instructions and full supervision. He may not have been in any degree at fault. Nevertheless the master or employer or principal is held for what servant or employee or agent does in the scope and course of his employment.¹²

The idea of negligence as moral fault had to be given up.

2. *Causation*.¹³ (i) The Problem. What has made causation a vexed problem today is the difficulty of achiev-

12. This will be taken up in chapter 32, *post*.

13. 1 Beven, *Negligence* (3 ed. 1908) 82-104; Bohlen, *Studies in the Law of Torts* (1926) chap. 1; Goodhart, *Essays in Jurisprudence and the Common Law* (1931) chaps. 6, 7; Greene, *Rationale of Proximate Cause* (1927); Prosser, *Handbook of the Law of Torts* (2 ed. 1955) chap. 8; 1 Street, *Foundations of Legal Liability* (1906) chap. 8; Wigmore, *Summary of the Principles of Torts in 2 Select Cases on the Law of Torts* (1912) 865-875; Winfield, *Textbook of the Law of Tort* (4 ed. 1948) 64-81; American Law Institute, *Restatement of the Law of Torts* (1934) § 431; 2 Planiol et Ripert, *Traité élémentaire de droit civil* (11 ed. 1932) no. 869; 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9 ed. 1903) § 129; Pound, *Causation*, 66 *Yale Law Journ.* 1 (1957); Smith, *Legal Cause in Actions of Tort* (1911) 25 *Harvard Law Rev.* 103, 233; Beale, *The Proximate Consequences of an Act* (1920) 33 *Harvard Law Rev.* 633; Pollock, *Liability for Consequences* (1922) 38 *Law Quart. Rev.* 165; James and Perry, *Legal Cause* (1951) 60 *Yale Law Journ.* 761; Green, *Are There Dependable Rules of Causation* (1925) 77 *Univ. of Pa. Law Rev.* 601; Edgerton, *Legal Cause* (1928) 72 *Univ. of Pa. Law Rev.* 211, 343; McLaughlin, *Proximate Cause* (1925) 39 *Harvard Law Rev.* 149; Gregory, *Proximate Cause in Negligence—A Retreat from Rationality* (1938) 6 *Univ. of Chicago Law Rev.* 36; Hirschberg, *The Proximate Cause in the Legal*

ing a satisfactory balance between the social interest in the general security as a basis of tort liability and the social interest in the individual life as the basis of limitations upon liability. In contrast to the days when men went about in horse drawn vehicles, reaped with sickles, scythes, or cradles, and threshed with a flail, we now travel in streamlined trains and motor vehicles and airplanes at what would have seemed to our forbears at incredible speeds, and accidents from mechanisms out of control and to some extent beyond ordinary powers of control are incident to our everyday life in all callings. But if the general security requires putting pressure upon those in control of the instrumentalities of danger to life and limb, the economic order calls for a large measure of free individual activity, if for no other reason, in order to enable the abundant productive activity demanded for a crowded world with highly specialized individual tasks. Liability must not extend to the doctrine of article 406 of the Soviet Civil Code,¹⁴ or of what I have called "the involuntary Good Samaritan," or of Lord Bramwell's story of the pickpocket who heard the charity sermon.¹⁵ How is

Doctrine of the United States and Germany (1929) 2 So.Cal.Law Rev. 107; Kahn-Freund, Remoteness of Damage in German Law (1934) 50 Law Quart. Rev. 512.

14. "In situations where . . . the person causing the injury is not under a duty to repair the injury, the court may nevertheless compel him to repair the injury, depending upon his property status and that of the person injured." Soviet Civil Code (1923) art. 406.

15. Pound, Introduction to the Philosophy of Law (rev. ed. 1954) 103-104.

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the balance to be reached? It cannot be attained by an apparatus of exact rules, attaching definite detailed legal consequences to definite detailed states of fact, as in the law of property. A basis must be found in principles—received authoritative starting points for legal reasoning.

(ii) Technical development of the theory of proximate causation. In the common-law world “causation appears first in the seventeenth century in terms of the Aristotelian scholastic logic distinguishing *causa causans* and *causa causati*.”¹⁶ Later it was said: “He that does the first wrong shall answer for all consequential damages,”¹⁷ or, “Everyone who does an unlawful act is considered as the doer of all that follows.”¹⁸ Next the phrase is: “The legal and natural consequences of the wrongful act.”¹⁹ The term “proximate” came in later in the form “natural and proximate consequences.”²⁰ In 1845 Broom’s Maxims²¹ included Bacon’s maxim, “*In jure non remota causa sed proxima spectatur*”²² and his comment: “It were infinite for the law to judge of the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause; and judgeth of act by that, without looking to any further degree.”²³ Greenleaf in 1846 laid down that damages “must be the natural and proximate consequences of the wrong-

16. Earl of Shrewsbury’s Case, 9 Co. 42, 50 (1610).

17. Roswell v. Prior, 12 Mod. 626, 639 (1700).

18. Scott v. Shepherd, 2 W.Bl. 892, 899 (1773).

19. Vicars v. Wilcocks, 5 East 1, 3 (1806).

20. Ward v. Weeks, 7 Bing. 211, 212 (1830).

21. Broom, A Selection of Legal Maxims, 104 (1845).

22. Bacon, Maxims of the Law (1630) 1; 7 Bacon’s Works (Spedding, Ellis & Heath ed. 1879) 325.

23. Ibid.

ful act,"²⁴ apparently taking the phrase from the argument of Sergeant Wilde (afterward Lord Truro) in *Ward v. Weeks*.²⁵ Bacon's maxim appears to have been first used in America in a case in Pennsylvania in 1863.²⁶ The phrase came into general use in America in the last quarter of the nineteenth century.²⁷ But as the maxim stands it is quite misleading. Long before the courts began quoting it, it had been said truly: "The reasonable inquiry . . . is not which is nearest in place or time, but whether one is not the efficient producing cause, and the others but incidental."²⁸

(iii) The controversy down to the Restatement by the American Law Institute. Although for a time established in the United States, the maxim as to proximate cause was not received as such in England. In England two views came to be urged. One was founded on the analysis of fault and causation formulated in the French Civil Code.²⁹ It was announced by Blackburn, J., afterward Lord Blackburn, in 1870.³⁰ As developed by Beven in the leading English text on negligence, it held that there were two questions to be put: "1st, an inquiry whether the act causing the injury was wrongful; that being established, then, what are the actual continuous consequences of the wrongful act? The liability is determined by looking *a post*, not *ab ante*. The defendant's view of the possibilities of his act is very

24. 2 Greenleaf, *Treatise of the Law of Evidence* (1846) § 265.

25. *Supra*, n. 20.

26. *Scott v. Hunter*, 46 Pa. 192 (1863), where it was evidently taken from Broom's *Maxims*, reprinted in the Law Library published in Philadelphia, 1830-1860.

27. Cooley, *Torts* (1 ed. 1879) 68 under the heading "proximate and remote cause," citing Bacon's maxim from Broom.

28. Thomas, J. in *Marble v. Worcester*, 4 Gray 395, 406 (1855).

29. Art. 1382.

30. *Smith v. London & S. W. Ry.*, L.R. 6 C.P. 14, 21-22 (1870).

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material to determine whether his act is negligence or not; it is utterly immaterial to limit liability when once liability has been established.”³¹ His doctrine was followed to some extent by writers in America.³² The other view was urged by Sir Frederick Pollock, who had questioned the dicta on which Beven built³³ and later developed his criticism as applied to Beven.³⁴ He laid down that the accepted test for liability for negligence is also the proper measure of liability for the consequences. There was but one question, not two.

In the United States the subject was first fully and critically explored by Judge Jeremiah Smith in 1911–1912 in a series of three articles in the *Harvard Law Review*.³⁵ His conclusion, not generally followed at first, has proved to be a contribution of the first magnitude. As he put it: “*Problem*.—What constitutes such a relation of cause and effect (such a causal relation) between defendant’s tort and plaintiff’s damage as is sufficient to maintain an action of tort?”

“*General Rule*.—Defendant’s tort must have been a substantial factor in producing the damage complained of.”

“Or,—To constitute such causal relation between defendant’s tort and plaintiff’s damage as will suffice to maintain an action of tort, the defendant’s tort must have been a substantial factor in producing the damage complained of.”³⁶ The significance of this will appear in connection with concurrent negligence.

31. 1 Beven, *Neglligence* (3 ed. 1908) 89, n. 2. The first edition was published in 1889.

32. 1 Street, *Foundations of Legal Liability* (1906) 91; Bohlen, *Studies in the Law of Torts* (1926) 8, n. 15.

33. Pollock, *Law of Torts* (1 ed. 1887) 369, 403.

34. *Id.* *Liability for Consequences* (1922) 38 *Law Quart.Rev.* 165.

35. *Legal Cause in Actions of Tort* (1911–1912) 25 *Harvard Law Rev.* 103, 223, 303.

36. *Ibid.* 309–310.

Discussion and controversy went on for twenty years till the Restatement of the Law of Torts by the American Law Institute (1934) and is still going on, especially with respect to two cases, the *Polemis* case³⁷ in England and the *Palsgraf* case³⁸ in New York which will be considered presently. The next thoroughgoing study was made by Professor Beale. He argued that in order to hold a defendant liable for injury suffered the force he has set in motion must (a) have remained active itself or created another *force* which remained active until it directly caused the result; or (b) have created a new active risk of being acted upon by the active force that created the result.³⁹ This was to meet the situation to which courts had been applying the deceptive analogy of "insulation." But if non-action creates a risk, is it to be "insulated" by supervening action of another, creating an added risk, the two co-operating in a serious injury? What reason is there for treating the risk created by the one who "started something" differently from liability for an injury within the ambit of the risk he created? The only reason is the one suggested by Bacon, namely, that it would be an infinite task to "judge of the causes of causes and their impulsions one of another." Professor Leon Green gave the answer: ". . . in any given case the inquiry is not directed toward discovering *the* cause of the damage, but is whether the defendant's conduct was *a* cause of damage." He added: ". . . the consideration of other cause factors is incidental and only material on two points: First, whether the part played by any other cause factor is a hazard for which defendant should be held; and second, whether in the light of all the other factors, the defendant's conduct played an *appreciable* part in the re-

37. *Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560.

38. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

39. Beale, *The Proximate Consequences of an Act* (1920) 33 *Harvard Law Rev.* 633, 658.

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sult.”⁴⁰ This last is the criterion proposed by Judge Smith. Coupled with the search for the ambit of the risk created it was a step forward.⁴¹ Also some American courts have worked out what is called the “but for” rule: “The defendant’s conduct is not a cause of the event if the event would have occurred without it.” This is considered by Judge Smith⁴² and by Professor McLaughlin.⁴³ It will not explain the case of concurrent negligence to be considered presently.⁴⁴

In 1920 the Supreme Court of Minnesota applied the test propounded by Judge Smith in 1911: The defendant’s conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.⁴⁵ Judge Smith’s idea was developed in the American Law Institute’s Restatement of the Law of Torts.⁴⁶ Part of the comment on that section is worth quoting: “The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called ‘philosophic sense,’ which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called ‘philosophic sense,’ yet the effect

40. Green, *Rationale of Proximate Cause* (1927) 134, 200.

41. Professor (later Judge) Edgerton in connection with the case of *Smith v. London & S. W. Ry.*, *supra* n. 30, considers the effect of “slight chance of harm.” *Legal Cause*, 72 *Univ. of Pa. Law Rev.* 211. This ties in with the idea of the ambit of the risk created.

42. *Legal Cause in Actions of Tort*, II, 25 *Harvard Law Rev.* 223 (1912).

43. *Proximate Cause*, 33 *Harvard Law Rev.* 149, 197 (1925).

44. See Prosser, *Handbook of the Law of Torts* (2 ed. 1955) 220-221.

45. *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 146 *Minn.* 430, 179 *N.W.* 45 (1920).

46. 3 *American Law Institute, Restatement of the Law of Torts* (1934) § 431.

of many of them is so insignificant that no ordinary mind would think of them as causes.”⁴⁷ It is submitted that the causes in the philosophic sense last referred to may not in themselves have been serious threats to the general security. This is significant in connection with the idea of the ambit of the risk.

As to the course of decision in England, Sir Percy Winfield states as a result of the cases down to 1948 that a consequence is not too remote if it is “direct” and that where physical consequences result from negligence they are not necessarily indirect because a reasonable man would not have foreseen them. By physical consequences he means, as he tells us, “consequences likely to ensue in accordance with the scientific laws known to govern the world, irrespective of whether a reasonable man would have foreseen such consequences.” But subject to that statement he considers the criterion to be whether a reasonable man would have foreseen the consequences.⁴⁸

(iv) Causation and the ambit of the risk. All that has been said as to causation must today be considered in the light of the present-day concept of negligence as the casting of an unreasonable risk of injury upon others and so a threat to the general security. This is what the Restatement of the Law of Torts is feeling for in its definition: “In the Restatement of this Subject, negligence is any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.”⁴⁹ The prob-

47. *Ibid.* pp. 1159-1160.

48. Winfield, *Text-Book of the Law of Torts* (4 ed. 1948) 73-74.

49. 2 American Law Institute, *Restatement of the Law of Torts* (1934) § 282.

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lem of causation thus becomes one of ascertaining the ambit of the risk created by the defendant.

But if, as has often been said, foreseeability is hard to define with respect to particular cases, are we better off in asking about the ambit of the risk created? I submit that the test of the ambit of the risk is the degree of threat to the general security, under the circumstances of today, in what the defendant did or how he was doing it. This is brought out in two recent leading cases, the *Polemis* case in England and the *Palsgraf* case in New York.⁵⁰ In the *Polemis* case a workman employed by defendants dropped a plank into the hold of the plaintiff's ship and thereby caused an explosion of gasoline vapor which destroyed the ship. It was found that the workman could not have anticipated the explosion but should have foreseen other possible injury. The Court of Appeal held the defendant liable even though the damage could not have been foreseen.⁵¹ In the *Palsgraf* case a man carrying a small package sought to board a car on a moving suburban train but seemed unsteady as if about to fall. A guard on the car, who held the door open, reached forward to help him in and another guard on the platform pushed him from behind. The package was dislodged and fell upon the rails. It contained fireworks which exploded and the shock of the explosion threw down some

50. These cases are compared in Goodhart, *Essays in Jurisprudence and the Common Law* (1931) chap. 7.

51. *Re Polemis and Furness, Withy & Co.*, [1931] 3 K.B. 560.

scales at the end of the platform many feet away and the plaintiff was struck and injured. The package was covered by a newspaper and there was nothing about it to indicate that it contained anything more than some ordinary small purchase. Judgment for the plaintiff was affirmed by the Appellate Division, but reversed in the Court of Appeals by a divided court, four to three, in an opinion by Cardozo, C. J., Andrews, J. writing a dissenting opinion.⁵²

Professor Goodhart considers these two cases are in conflict.⁵³ But I submit that they are reconcilable and that each is right in result, whatever differences may appear in the reasoning about causation. To drop a heavy plank into the hold of a big ship (valued at about one million dollars) is in itself a grave threat to the general security. Almost anything or any person might be struck with serious results, as happened in the actual case. There was no question of balance of the social interest in free individual action involved. The workman was not doing anything which he should be specially protected or encouraged or protected in doing. But in helping the passenger get on the car the guards were doing nothing that threatened the general security nor was there any threat to the general security in the way they did it. If

52. *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

53. Goodhart, *Essays in Jurisprudence and the Common Law*, 131 n. 8 (1931).

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there was danger that the package would be dropped, that in itself threatened no more than loss of the package. They were doing only what common humanity and their duty toward their employer impelled them to do and the social interest in their freedom of action should be weighed against any threat to the general security. Courts' intuitions are sometimes better than their reasoning.

(v) Causation and concurrent negligence. Concurrent negligence is negligence of two or more persons concurring not necessarily in point of time but in point of consequence in producing a single, indivisible injury. There can be concurrent tort-feasors even if they are not acting jointly. Three examples from current American decision suffice to make the point.

Case (1) was an action by injured passengers against a Bus Company and the General Motors Company, makers of the bus involved in the injury. The bus, which had a seating capacity of 38 was carrying 59 passengers and had given trouble with its brakes on an earlier trip. It was driven negligently down a steep hill on a road covered with stones and debris after a severe storm. The makers of the bus were found negligent in the design of the bus in that the pet cocks to drain the air chambers were left unprotected and so low to the ground as to be likely to be broken by such things as a stone on the highway and let the air escape and cause the braking system to fail. After the accident it was found that a pet cock on the bus was broken off. While going down the hill the braking power failed, the driver lost control and the bus was wrecked. Eleven persons were killed and forty-nine injured. The main controversy was between the two defendants. Each claimed that the other was

responsible. A judgment on verdict against both was affirmed.^{53a}

In case (2) the plaintiff, a mental patient in a hospital, was permitted by an attendant to go upon a heavily traveled highway, continually used by fast moving traffic, when his mental condition was such that he was unable to understand the danger, and was struck and seriously injured by a truck negligently driven by the driver of a codefendant. The trial court sustained a demurrer. The judgment was reversed.⁵⁴

Case (3) was an action by an employee of the consignee against the consignor, the initial carrier, intermediate carriers, the delivering carrier, and an employee of the delivering carrier for injury while unloading the contents of a defective and negligently loaded and uninspected box car. Overruling of demurrers was affirmed.⁵⁵

In case (1) there is a clear and emphatic statement by a strong court against the fallacious proposition that injuries in such cases are to be attributed exclusively to the last actor as the "proximate cause." The General Motors Company negligently set the stage which subjected the plaintiffs, as persons who it was to be expected would ride in the bus, to an unreasonable risk of injury. The Bus Company, acting negligently on the set stage, added its negligence to that of the General Motors Company, thus producing the injuries sued for. The injuries were within the ambit of a risk to which the plaintiffs were unreasonably subjected by each defendant independently. In this case the threat to the general security by the risk created by each de-

53a. *Carpini v. Pittsburgh & Wierton Bus Co.*, 216 F.2d 404 (C.C.A.3d 1954).

54. *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954).

55. *Yandell v. National Fireproofing Corp.*, 239 N.C. 1, 79 S.E.2d 223 (1953).

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fendant was very serious, as shown by the great number killed and injured.

In case (2) the hospital (hospitals have no immunity in Kansas) negligently set a perilous stage and the codefendant came along and acted on it negligently. Some courts would say the negligence of the driver of the truck was the proximate cause of the injury.⁵⁶ But here each independently subjected the plaintiff to an unreasonable risk of injury. Plaintiff was in the ambit of the risk created by each and the negligence of each was a substantial factor in the resulting injury. To allow the mental patient to be unattended on a busy highway, where motor traffic was passing and repassing continuously was a grave threat to the general security. To drive a truck carelessly on such a highway was a threat no less grave. There was concurring negligence.

In case (3) each of the defendants held liable imposed a risk upon every one who had occasion to come in contact, as many in the ordinary course of railway operation obviously would, with the negligently loaded defective box car. There was a grave threat to the general security and the plaintiff was injured in the ambit of the risk created by the concurring negligences which concurred in producing the one injury.

Courts have been troubled about cases of concurring negligence because the injured party may sue any one of the concurrent tort-feasors and obtain judgment against him and thus the last actor may escape even although, while the negligence of the one held may have contributed substantially to the result, it is the last actor

56. So argued in the dissenting opinion in *Langston v. Moseley*, 223 Ark. 250, 265 S.W.2d 697 (1954). But the majority of the court held all three concurrent independent tort-feasors in a like case.

who was the most to blame. This is a mischievous result of the doctrine of no contribution among tort-feasors, due to the idea that negligence is moral fault and so there are no equities among wrongdoers. As things are moral obliquity is not a necessary element or quality of negligence. The doctrine is out of place in the law of today and is steadily disappearing through legislation.

Putting on the market a bus with braking apparatus liable to fail, careless driving of an overloaded passenger bus, failure to attend demented patients and allowing them to go at large on crowded city streets, putting defective cars on trains going on long journeys through many states and carelessly loading them make such threats to the general security under the conditions of life today that courts are giving up the quest of determining how and when to exempt a tort-feasor from liability for effects of which his tort was a substantial part of the cause.

(vi) Causation in the law of Continental Europe.⁵⁷ In France the course of judicial decision has not been troubled by any problem of attributing damage to one determinate cause. It holds to the antecedent items of fault and pays no attention to the others. The causes are held equivalent as to the relation of cause to damage. It is held enough if that relation exists. It is the character of being a causal act that is material. If there are a number of blameworthy acts all the actors in them are to

57. 6 Planiol et Ripert, *Traité pratique de droit civil français* (1930) nos. 538-541; Müller, *Die Bedeutung des Kausalzusammenhanges im Straf- und Schadensersatzrecht* (1912); Rümelin, *Verwendung der Causalbegriffe in Straf- und Civilrecht* (1900).

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be held. The question will then be as to division of responsibility, which will be made not according to the degree of effect but according to the degree of gravity of fault. But in some cases the course of judicial decision considers that one of the blameworthy acts has been so grave as to have swallowed up the others.⁵⁸ In such a case, we are told, the courts turn to the idea of "adequate causation," or, as it has been put in Anglo-American law, "proximate cause."⁵⁹ This, it will be seen, is much what the American Law Institute's Restatement, following Judge Smith, has laid down as to a "substantial factor" in bringing about the injury, and the American courts have now come to in cases of concurrent negligence.

In Germany, the code makes no specific provision as to causation, using only general terms such as "damage arising from" wrongful acts,⁶⁰ or if an act "causes damage."⁶¹ The course of juristic writing ("doctrine") puts the question of causation as one of "scientific probability." There is search among the antecedents of the injury for the one which is its necessary condition. This is called "adequate cause." There is a full and logically developed discussion by Endemann.⁶² His exposition of the "chain

58. Compare the "insulation" analogy in American negligence cases.

59. 2 Planiol, *Traité élémentaire de droit civil* (ed. nouv. par Ripert 1943) no. 1020.

60. German Civil Code, § 923.

61. *Ibid.* §§ 826, 827, 828.

62. 1 *Lehrbuch des bürgerlichen Rechts* (9 ed. 1903) § 129, pp. 731-743.

of causation" is much the same as Professor Beale's. He says: "A going back to the first actor is justified (a) if a coincidence of operation has taken place which may be appraised as concurrent misfeasance; (b) if his conduct has brought about a state of things which has made necessary or provoked the culpable interference of the other; (c) so far as his act of itself amounts to a completed event, each is liable individually for the injury caused by him."⁶³ This, too, is about what the recent American cases are coming to.

Restriction of liability to the one cause nearest to the injurious result is now pretty well given up everywhere.

3. *What may we say of the will theory of acts?* It must be recognized that the urbanizing and mechanizing of life and concentration in business and industry have been bringing about a regime of standard contracts and what the French call "contracts of adhesion,"⁶⁴ in which the learning of legal transactions as products of the free will has little for us. Also the need of promoting and maintaining equality of bargaining power in industry has led to collective bargaining more or less under administrative supervision in which government may play the leading role. Moreover, the rise of the service state has brought with it standard clauses and statutory standard

63. Ibid. pp. 742-743.

64. 2 Demogue, *Traité des obligations en général* (1923) no. 616.

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terms in contracts of many sorts, and war and inflation have required extension of excuses for non-performance and doctrines as to frustration which impair what had been regarded as an essential feature of legal transactions. On another side, statutes as to how wages must be paid and forbidding contracts as to the mode of payment, legislation as to warranties in policies of life insurance and judicial banning of contracts by employees not to exercise after leaving the employment the calling in which they had been trained, minimum wage laws, rent control laws, and British legislation as to administrative varying of the terms of leases, have taken wide fields of every day activities out of the domain of legal transactions.

So, too, in the law of torts we go today far beyond ideas of culpably willed action to attach liability to situations where the service state intervenes. But much of everyday relations of man and man remains in the law of contracts and of torts as derived from the will of those who enter into relations freely and of those who freely fall short of legal requirements in their willed actions with resulting injury to others.

Quite apart, then, from a psychological question how far there is such a thing as individual free will, we cannot take that concept for the starting point of the legal system of today nor make it the central point of a science of law. Yet we can by no means ignore it. If we accept Radbruch's definition of justice as the ideal relation

among men,⁶⁵ not the least feature of that relation is put in Stammler's first principle of just law: "The content of a person's will must not be subjected to the arbitrary will of another."⁶⁶ Is it not that we seek to provide as much as we may for realizing the total of men's reasonable expectations in life in civilized society with a minimum of friction and waste? Free self determination is a much prized and eminently reasonable expectation which must ever be weighed in adjustment of relations in and by politically organized society.⁶⁷

65. *Rechtsphilosophie* (4 ed. 1950) § 9.

66. *Lehre von dem richtigen Rechte* (rev. ed. 1926) 148.

67. See Pound, *The Role of the Will in Law* (1954) 68 *Harvard Law Rev.* 1.

Chapter 27

Things

§ 130. Things.

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Chapter 27

Things¹

Section 130



THINGS. 1. *Conception and definition.* By the term *res*, thing, *chose*, *sache*, in law we mean the object element of a right in the stricter sense. That is, in the received analysis the relation of right (in the stricter sense) and duty has to do with persons, entitled and obliged, with acts or forbearances demanded on one side and required on the other, and with respect to some particular thing. Hence we get the definition: "Whatever is treated by the law as

1. 1 Austin, *Jurisprudence* (5 ed. 1885) lect. 13; Holland, *Jurisprudence* (13 ed. 1924) 101-107; Markby, *Elements of Law* (6 ed. 1905) §§ 126-130; Pollock, *First Book of Jurisprudence* (6 ed. 1929) 130-141; Korkunov, *General Theory of Law* (transl. by Hastings, 1909) § 30; Kocourek, *Jural Relations* (1926) chap. 18; id. *Introduction to the Science of Law* (1930) 285-287; Paton, *Jurisprudence* (2 ed. 1951) § 112; Buckland, *Text-Book of Roman Law* (2 ed. 1932) 182-186; Allen, *Things* (1940) 28 *Calif. Law Rev.* 421; Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) nos. 204-222; Gorovtseff, *Études de principiologie du droit* (1928) nos. 1-39; 1 Kohler, *Lehrbuch des bürgerlichen Rechts* (1906) §§ 198-215; 1 Windscheid, *Pandekten* (9 ed. 1906) §§ 41, 137-144; 1 Dernburg, *Pandekten* (8 ed. 1911) § 55; Schuster, *German Civil Law* (1907) chap. 2; 1 Bierling, *Juristische Prinzipienlehre* (1894) pp. 239-274; Birkmeyer, *Das Vermögen im juristischen Sinne* (1879) §§ 1-26; Fuchs, *Grundbegriffe des Sachenrechts* (1917) §§ 1-9; 2 Ahrens, *Cours de droit naturel* (8 ed. 1892) § 54; Hegel, *Philosophy of Right* (transl. by Knox, 1942) §§ 41-43—translation of Hegel, *Grundlinien der Philosophie des Rechts* (ed. by Gans, 1840); Kohler, *Lehrbuch der Rechtsphilosophie* (3 ed. 1923) § 52.

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the object over which one person exercises a right and with reference to which another person lies under a duty.”²

Kocourek holds that the primary elements in jural relations are acts and persons: “Jural things are not strictly elements of a jural relation. They are situations of law (and also of fact) to which the jural relation is directed.”³ This is ingenious. But his ultra philosophical-logical analysis goes beyond what is useful in a highly practical subject. Austin rightly refused “to thrust a treatise on intellectual philosophy into a series of discourses upon jurisprudence.”⁴ The purpose of definitions and distinctions in jurisprudence is to facilitate attainment of the ends of the legal order, not to construct a thoroughgoing metaphysic of legal conceptions and precepts.

Austin speaks of “such permanent external objects as are not persons”⁵ and it is abhorrent in the world of today to think of a human being otherwise than as a person—a subject, not an object of rights. But there was a time in the beginnings of law when slaves and dependent members of the household were held in ownerships and at a later time slaves or “persons bound to service and labor” had an intermediate position, in some aspects persons, in some aspects things.⁶ In modern law the distinction is fundamental: Persons have rights and duties; things have neither. The Pandectists found the essential point in volition. Holland approved Baron’s definition of a physical thing

2. Holland, *Jurisprudence* (13 ed. 1924) 101. “The outlying object of jural relations.” Kocourek, *Jural Relations* (1927) 307.

3. Kocourek, *Introduction to the Science of Law* (1930) 285–286.

4. 1 Austin, *Jurisprudence* (5 ed. 1885) 358. See also, Allen, *Things* (1940) 28 *Calif. Law Rev.* 421, 425.

5. 1 *Jurisprudence* (5 ed. 1885) 358.

6. See *ante* § 125, 3(a).

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(*Sache*) as "a locally limited portion of volitionless nature."⁷ As Allen well puts it, "we do not attribute to animate creatures the kind of volition which is recognized by law."⁸

"Thing" may be thought of as primarily or typically a physical object, an idea extended by analogy to acts or to duties of acting or forbearing as objects of rights, e. g. in the law of obligations. Austin, who wrote from this standpoint, considered that the Roman jurists who spoke of incorporeal things used the language of the Stoics and of the Epicureans, who considered the several senses as organs of touch and sensations as modifications of the sensation of touch, when they spoke of acts as the objects of legal duties as *res quae tangi possunt*.⁹ Indeed, Cicero, writing of *res* in the sense of objects of thought, said they were divisible into *res quae sunt* and *res quae intelliguntur* and includes in the latter category acquisition by adverse possession, kin group, and guardianship.¹⁰ Accordingly Austin argued that every act which could be the object of a right or duty was an act external or perceptible by sense. True the expression *res corporales*

7. Baron, Pandekten (9 ed. 1896) § 37; Holland, Jurisprudence (13 ed. 1924) 103, n. 1. This approved also by Allen, Things (1940) 28 Calif. Law Rev. 421, 424-425.

8. Allen, *ibid*.

9. Zeller, Stoics, Epicureans and Sceptics (transl. by Reichel, 1892) 77, 426-427, 457-458, 498-504 530.

10. Cicero, Topica, 1, 5. The New Academy, to which Cicero adhered, "regarded the Stoic appeal to the senses as the only possible form of a theory of knowledge." Zeller, Stoics, Epicureans and Sceptics (transl. by Reichel, 1892) 530.

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would not apply strictly to forbearances since they were mere determinations of the will. But he considered that the term was extended to forbearances which were the objects of rights and duties partly for the sake of convenience and partly because the acts to be forborne were tangible and sensible.¹¹ But the Roman jurists were not metaphysicians. They were practical lawyers. They thought of the object of a right as an economic advantage to the person entitled: Anything by which one is "actually or prospectively better off."¹² Buckland puts it well: "In the institutional scheme a *res* is an element in wealth, an asset, an economic conception, essentially different from the Austinian thing, a permanent external object of sensation, which is a physical conception. . . . What was present to the author of the Roman classification was legally guaranteeable value."¹³ The economic view has prevailed in the legal science of today.¹⁴

On the analogy of "acts in the law" for acts intended to have and given legal effect,¹⁵ one might say "things in the law" for objects which are recognized by law as objects of rights.

11. Austin, *Jurisprudence* (5 ed. 1885) 360-361.

12. Moyle, *Institutes of Justinian* (1923) 187.

13. Buckland, *Text-Book of Roman Law* (2 ed. 1932) 182.

14. "We have to include all distinct elements of wealth, though not sensible or tangible, which can be the source of profitable use or benefit to any certain person." Pollock, *First Book of Jurisprudence* (6 ed. 1929) 140. See also Paton, *Jurisprudence* (2 ed. 1950) 410; Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) no. 204.

15. Pollock, *First Book of Jurisprudence*, (6 ed. 1929) 145, but see *ante* § 125.

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Salmond seems to use the phrase in this sense, saying: "A man's life, reputation, health and liberty are things in law no less than are his land and chattels."¹⁶ To the extent that these can be valued in money in an action for damages¹⁷ these and the claim to the services of wife or child, are within the definition although they are treated in the law of persons rather than the law of things.¹⁸ The concept of object of a right extends to more than is included in the law of property.

While in English we use but the one word "thing" the French jurists have two words, *choses* and *biens*. The latter is the legal term for the objects of rights. It "comprises in the first place things (*choses*) of the external world so far as they can become the property of particular individuals or of a collectivity. All these things (*choses*) come into the sphere of the law to the extent to which appropriation of them is an advantage to men, and it is because we look at them in this particular aspect that the law gives them the name of goods (*biens*). . . . In the second place they comprise the incorporeal values represented by rights of creditors and incorporeal rights."¹⁹

In German the word *Ding* is used in law only in the adjective *dinglich*, used in the sense in which we use the word "real" in speaking of real rights, or actions or proceedings *in rem*. The term for thing in the sense of the object of rights is *Sache*. But the German Civil Code²⁰ prescribes that only corporeal things are *Sachen* within the meaning of its provisions. This

16. Salmond, *Jurisprudence* (1 ed. 1902) 274.

17. As an executor or administrator may sue under Lord Campbell's Act for wrongfully causing death.

18. As to this see post § 131.

19. Capitant, *Introduction à l'étude du droit civil* (4 ed. 1923) no. 204.

20. German Civil Code, § 90.

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was laid down to avoid what was said to be a fiction of law as to "incorporeal" things, and to conform the language of the code to popular usage.²¹ Objects of rights which we speak of as incorporeal are included in the term *Vermögen*.²² Little is gained by this. The German jurists are divided as between a narrow view that only such things are included as are tangible and occupy space and a more liberal view that anything which can be perceived by its physical effects and can form the object of rights is within the definition.²³ Kohler takes the latter view as to water, gas, and steam, but refuses to admit electricity.²⁴

In American law, gas, water in water mains and irrigation ditches, and electricity being capable of measurement by meters, are held to be objects of rights capable of misappropriation.²⁵ Kohler's objection as to electricity is based upon the limits prescribed by the German Civil Code. But Schuster would not stretch the code provision even to gas and water. On the other hand, an English court was willing to put vibration caused by driving piles in the category of corporeal things.²⁶ That is, it was intimated that the vibration was something brought on his land by the defendant which he must keep to the bounds of his premises and not allow to escape and damage his neighbor's land, within the rule in *Rylands v. Fletcher*.²⁷ But obviously it could not be said that the vibrations were in any way an asset or had value or advantage to anybody. The act of causing them was an infraction of the *jus utendi* of the neighbor's land. It

21. Schuster, German Civil Law (1907) 58.

22. *Infra*, 3.

23. Schuster, German Civil Law (1907) § 71.

24. 1 Lehrbuch des bürgerlichen Rechts (1906) 449.

25. *People v. Menagas*, 367 Ill. 330, 11 N.E.2d 403, 113 A.L.R. 1276 (1937); *United States v. Carlos*, 21 Philippine Rep. 553 (1911).

26. *Hoare & Co. v. McAlpine*, [1923] 1 Ch. 167.

27. L.R. 3 H.L. 330 (1868).

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was not necessary to hold vibration an object or thing in order to decide the case. Causing vibrations so as to injure adjacent property is a nuisance quite apart from the rule in *Rylands v. Fletcher*.²⁸

A question has been raised as to *res nullius*, *res communes*, and abandoned chattels. Allen considers that wild animals are not things in any legal sense even where legislation makes it a punishable offense to kill game animals out of season or in forbidden areas. "In themselves they do not seem to come within the true conception of a thing-in-law."²⁹ On the other hand, says Paton, a lion is a lion even before it is caught.³⁰ Whether there may be wild lions going at large on private property available to hunters of big game in Kenya I am not advised. But Blackstone speaks of the "qualified property" in animals *ferae naturae*, a transient property in them so long as they remain on the landowner's land.³¹ As to *res communes*, Paton suggests that where the law refuses to recognize something as the object of a right, instancing the Roman law as to running water, it should "fall outside the legal definition of a *res*".³² At common law, however, a riparian owner has a right that no other riparian owner take out or use the water beyond what permits an equal taking out or use by all other riparians and that there shall be no taking out by non-riparians.³³ Also riparian rights to take out or use running water may be condemned by eminent do-

28. *Hennessy v. Carmody*, 50 N.J.Eq. 616, 25 A. 374 (1892).

29. Allen, *Things* (1941) 28 California Law Rev. 421, 424.

30. Paton, *Jurisprudence* (2 ed. 1951) 410.

31. 2 Blackstone, *Commentaries on the Laws of England* (1766) 394-395. "The property is his *ratione soli*." Holt, C. J. in *Smallcomb v. Buckingham*, 5 Mod. 375 (1697).

32. *Jurisprudence* (2 ed. 1951) 410.

33. *Embrey v. Owen*, 6 Ex. 353 (1851).

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main.³⁴ And in the arid and semi-arid states of the United States ownership of the water of a running stream may be acquired by appropriation.³⁵ As to abandoned chattels, we may well ask whether one of even the least value must be for the time being the object of the right of some particular person or it is enough that it is capable of becoming the object of some one's right when found and taken into possession. Moreover, so long as it remains on some one's land a trespasser cannot acquire ownership by taking possession of it. The landowner can maintain an action against the finder converting it.³⁶

2. *Classification.* The Roman institutional books classify things as *res corporales* corporeal things *quae tangi possunt*, or *incorporales*, incorporeal things, *quae tangi non possunt*.³⁷ On the one hand they are material objects, physical things, perceptible by the external organs of sense and permanent to the extent of being perceptible repeatedly—in distinction from an event perceived transiently.³⁸ Yet, as was shown above, things may exist in the physical world and be counted properly as corporeal without a body in the ordinary use of the word but capable of measurement in definite units of space made use of in measured quantities.

34. *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905).

35. *Atchison v. Peterson*, 20 Wall. (U.S) 507, 22 L.Ed. 414 (1874).

36. *Barker v. Bates*, 13 Pick. 255 (1832).

37. Inst. 2, 2, pr. 1, 2; *Gaius*, 2, 12, 13.

38. 1 Austin, *Jurisprudence* (5 ed. 1885). As Pollock puts it: "Material sensible objects which can be dealt with in the way of manual use." Pollock, *First Book of Jurisprudence* (6 ed. 1929) 130.

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On the other hand, in a society of any degree of economic development it becomes convenient to recognize as objects of rights and governed by precepts applicable to corporeal things, intellectual objects, things purely artificial, a decedent's estate (*hereditas*), a bankrupt's estate, a *universitas*, a marriage portion, the separate property of a dependent (*peculium*), i. e. groups of economic advantages; or of another type, patents, trade marks, copyrights; or of another, credits, securities and claims against others realizable in money or pecuniary advantage. Here what the law had learned to do as to physical objects became practically applicable as means of maintaining the economic order.

But usage has not been consistent. British legislation defines "land" as including a franchise to be a manor, an advowson (power of presenting a candidate for a living in the established church), an easement, and a "right, privilege or benefit over land."³⁹ The real point is that what are called incorporeal things are governed in general by the law which grew up for the material objects of rights and duties.

Again, the Romans made a worth while distinction between *res singulae* and a *universitas rerum*. Whether the idea of *universitas rerum* is classical or post-classical⁴⁰ is no matter for our purpose. At any rate, it grew

39. Law of Property Act (1925). This would include the benefit of a covenant running with the land.

40. See Buckland, Text-Book of Roman Law (2 ed. 1932) 307-308.

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out of the exigencies of the Roman law of succession. The concept of a totality of things as itself a thing-in-law is of every day importance. The identity of the totality remains as the object of many rights whatever changes may have taken place as to component items. Examples in Anglo-American law are a decedent's estate and a bankrupt's estate. While these aggregates of rights and duties are not personified (the executor or administrator or the trustee in bankruptcy sues and defends, not in form the estate) yet we speak of debts and duties owing to or owing by the estate and in the title of the case in the reports the reporter often puts the estate as the name of the party as if it were a corporation. The example going back to Roman law is sale of a herd or a flock. Sale of a crop or of a stock of goods or of a business may be added.

Also the Roman jurists held that there were three kinds of corporeal things.⁴¹ They might be simple such as a statue,⁴² or compound, where the thing may be different from its parts (e. g. a ship), or may be an aggregate of them (e. g. a cache of gold coins),⁴³ or may be an aggregate of distinct things conceived of as a whole.⁴⁴ These become practically useful distinctions in cases of

41. Dig. 41, 3, 30; Windscheid, Pandekten (9 ed. 1906) § 138.

42. Dig. 6, 1, 23, 5.

43. *Danielson v. Roberts*, 44 Ore. 108, 74 P. 913, 65 L.R.A. 526 (1904).

44. Inst. 2, 20, 18, 1.

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sales or mortgages of a stock of goods, a herd, the properties of a theater, or the plant and business of a factory.

Another important distinction sets off tangible things, things as to which one item or one quantity is as good as another⁴⁵ so that a person may be bound for a number of quantity, not for specified items,⁴⁶ and goods may be mingled with others of the same kind and grade without loss of right of ownership.⁴⁷

The German Civil Code further distinguishes consumable and non-consumable things. The essence of the distinction is said to be that consumption or alienation must be what is intended in ordinary usage. The definition is: “. . . movable things intended to be used or enjoyed by means of being consumed or alienated.”⁴⁸ Examples of things to be used or enjoyed by being consumed, food or fuel; of things intended to be used or enjoyed by being alienated, money, bank notes, cheques and negotiable instruments circulating as money. Items of a stock in trade or an aggregate of things intended to be used by successive alienation of the items forming part thereof are pronounced consumable things.⁴⁹ The practical application is in connection with the matrimonial property regimes, e. g. powers of management and disposition of community property.⁵⁰

45. As to the distinction between tangible and non-tangible, Dig. 19, 2, 31.

46. “Tangible goods means goods of which any unit is from its nature or by mercantile custom treated as the equivalent of every other unit.” Uniform State Laws, Uniform Warehouse Receipts Act, § 58 (1906).

47. Ibid. § 23; United States Warehouse Act, § 16 (1916).

48. German Civil Code, § 92(1).

49. Ibid. § 92(2).

50. Schuster, German Civil Law (1907) 674.

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As to classification of *res Mancipi* or *nec Mancipi*, real or personal property, movable or immovable, *res in commercio* or *extra commercium*, means of production or consumer's goods, see *post* chap. 30.

3. *The concept of patrimony.*⁵¹ In Roman law the term *bona* is used for the totality of a person's economic condition. In modern civil law patrimony (*patrimoine*, *Vermögen*) is used. But *bona* was used for items as well as for the whole of a person's wealth as security.⁵²

In French law we are told that patrimony means the ensemble of the rights and charges (i. e. economic burdens) of a person looked upon as a universality of law. That is, the patrimony constitutes an abstract unity distinct from the goods and charges which comprise it. The latter, it is said, may change or diminish or disappear entirely, but not the patrimony, which will remain during the person's whole life. It is said that what characterizes the concept of the patrimony is the cohesion it establishes between the elements of which it is formed.⁵³ This cohesion is of interest in three ways: (1) It explains the power of taking on execution which belongs to creditors.⁵⁴ They may make themselves paid from all the goods pres-

51. 9 Aubry et Rau, *Droit civil français* (5 ed. 1917) §§ 573-583; Gény, *Méthode d'interprétation* (2 ed. 1919) § 68; Demogue, *Notions fondamentales du droit privé* (1911); 3 Planiol et Ripert, *Traité pratique de droit civil* (1926) nos. 15-35.

52. Birkmeyer, *Ueber das Vermögen* (1879) 1-2.

53. 3 Planiol et Ripert, *Traité pratique de droit civil* (1926) no. 15.

54. See *post*, chap. 33, 5.

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ent and future of the debtor because “debts bind the patrimony.”⁵⁵ (2) It explains why on the death of the owner the patrimony is transmitted to the heir in the state in which it is, with its claims and its liabilities—its active and passive obligations. (3) It serves for what the French call “real subrogation,” cases where a patrimony is the object of a decree of restitution—where one person holds the patrimony of a deceased or an absent person and upon decree of restitution to one better entitled it becomes necessary to avoid confusion of two patrimonies.⁵⁶

What has been called the classical theory of the patrimony holds that the legal concept is a logical deduction from the idea of personality⁵⁷—“an emanation of personality and the expression of the juridical powers with which a person is invested as such.”⁵⁸ Accordingly it was laid down: (1) Only persons can have a patrimony; (2) every person necessarily has a patrimony; (3) every person has but one patrimony; the patrimony is inseparable from the person.⁵⁹ Planiol says rightly that this theory exaggerates the bond between the idea of patrimony and the idea of personality, and confirms the ideas

55. French Civil Code, art. 2092.

56. 3 Planiol et Ripert, *Traité pratique de droit civil* (1926) no. 33.

57. “A person must translate his freedom into an external sphere in order to exist as Idea.” Hegel, *Grundlinien der Philosophie des Rechts* (1821) § 41; Knox’s transl. *Hegel’s Philosophy of Right* (1942) 40.

58. 9 Aubry et Rau, *Droit civil français* (5 ed. 1917) § 573, p. 335.

59. 3 Planiol et Ripert, *Traité pratique de droit civil* (1926) no. 16.

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by attributing to patrimony the elements of inalienability and indivisibility, leading to unfortunate results, such as the proposition that a donee of a considerable portion of the goods (*biens*) of a donor cannot be considered an assignee by universal title and so cannot be held for debts of the donor to the extent of what he received by way of gift. Also in many cases there are true universalities distinct from the patrimony itself because the goods which compose it have a special interest different from the purpose common to the other elements of the patrimony. Each of these universalities has its own credits and debts and is subject to the normal application of what is called "real subrogation."⁶⁰ These are called *petits universalités* or *petits patrimoines*. But they are not reconcilable with the classical doctrine of the indivisibility of the patrimony.⁶¹ The modern idea of the patrimony is that what creates the cohesion between the elements composing the universality is a common particular distinction, not the personality of the person entitled.⁶²

In German the term used is *Vermögen*—"the sum total of the pecuniarily valuable rights of a person."⁶³ But the term

60. Real subrogation is the juridical substitution of one item of goods for another. The new item—credit, security, corporeal movable or immovable—taking the place of the old item, to be submitted to the same regime as was the latter. For example, separate property of a married woman separate from her part of the community property; goods part of a marriage portion as distinct from her paraphernalia. 3 Planiol et Ripert, *Traité pratique de droit civil* (1926) no. 26.

61. Ibid. no. 20.

62. Ibid.

63. 1 Dernburg, *Pandekten* (8 ed.) § 55 (1911).

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is used also in a narrower sense to mean what remains after deduction of debts and other existing burdens. There has been controversy whether the term should be used, as *patrimoine* is in French, to include both a person's economically valuable rights and his economically significant duties. We are told that in the prevailing juristic usage of today debts and existing rights of third persons are not constituent parts of the *Vermögen* but are burdens upon it.⁶⁴ The unity of the *Vermögen* is held to consist in that the several items belong to one person.⁶⁵

64. 1 Windscheid, Pandekten (9 ed. 1906) § 42, Kipp's note, pp. 179-180.

65. Ibid. 179.

END OF VOLUME



